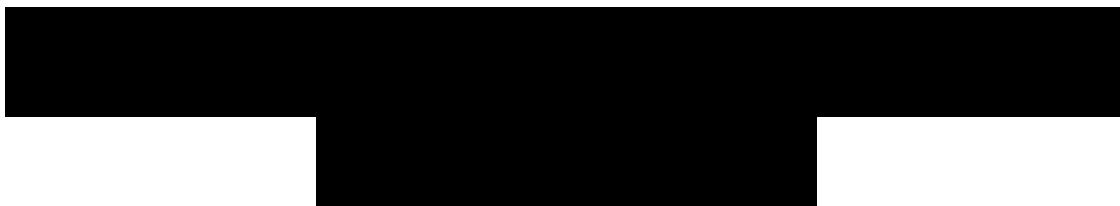
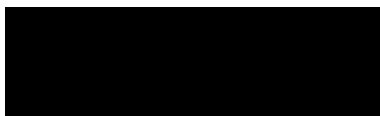


AE 046



UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

Defense Reply

To Government Response to Defense Motion
for Article 5 Status Determination, or,
Alternatively, Dismissal for Lack of Personal
Jurisdiction

30 November 2007

1. **Timeliness:** This Reply is filed within the timeframe established by the Military Commissions Trial Judiciary Rules of Court.

2. **Law and Argument in Reply to the Government Response:**

A. **The 13 November 2007 (Email) Order Called for the Parties to Address All Matters Affecting Personal Jurisdiction**

The Prosecution's first argument in opposition to the Defense Motion for an Article 5 Status Determination is that the "primary" issue at the December 5 hearing is "the factual basis for Hamdan's status as an alien unlawful enemy combatant under the MCA," and—according to the Prosecution—the Defense has offered no challenge to jurisdiction based on the MCA. Gov't Response at 4-5.

This argument is without merit because the 13 November 2007 (Email) Order instructed the parties to address "all . . . matters that might affect [personal] jurisdiction (i.e., issues arising under international law, constitutional law or criminal law)" at the December 5 hearing. An Article 5 hearing is an inquiry into POW status under both domestic¹ and international law that has a direct bearing on this Commission's jurisdiction. A person entitled to POW status under the Third Geneva Convention ("GPW") cannot be considered an "unlawful enemy combatant"

¹ Under the Supremacy Clause, U.S. Const. art VI, cl. 2, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."

subject to trial by commission under the MCA. This is because under GPW Article 102, a POW must be tried in the "same courts according to the same procedure" as a member of the U.S. armed services (i.e., a court-martial, *not* a military commission). Interpreting the MCA to permit a POW to be tried by a commission assumes that it was the intention of Congress to abrogate the GPW. Such an interpretation is untenable in light of language in the MCA revealing Congress's intention to comply with the Geneva Conventions. *See, e.g.*, 10 U.S.C. § 948b(f).

Moreover, "[a]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). It is certainly possible to read the MCA in a manner consistent with the GPW in this case. The Prosecution has identified no provision in the MCA that would be offended by conducting an Article 5 hearing. On the contrary, an Article 5 hearing regarding POW status is entirely consistent with the MCA inquiry into whether an individual is an "unlawful enemy combatant." The Defense motion does not depart from the statutory scheme. Rather, it calls for a simple procedure to ensure that the MCA is applied in a manner consistent with both U.S. and international law.

B. An Article 5 Status Determination Must Be Made by a "Competent Tribunal"

The Prosecution's next argument is that Hamdan is not entitled to an Article 5 hearing because the President has determined that members of al Qaeda cannot qualify as POWs under the GPW. Gov't Response at 5-6.

This argument fails for the same reason it failed when first advanced by the Government more than three years ago: GPW Article 5 requires the status determination to be made by "a competent tribunal."

The President is not a "tribunal," however. The government must convene a competent tribunal (or address a competent tribunal already convened) and seek a specific

determination as to Hamdan's status under the Geneva Conventions. Until or unless such a tribunal decides otherwise, Hamdan has, and must be accorded, the full protections of a prisoner-of-war.

Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 162 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005).²

The need for an individual status assessment was reaffirmed by the United States Court of Military Commission Review ("CMCR") in the *Khadr* decision:

Summary determinations of a group's unlawful combatant status would appear to violate the Supreme Court's ruling in *Hamdi v. Rumsfeld*, 541 U.S. 507, 533 (2004), which recognized the fundamental right to notice and an opportunity to be heard on matters affecting a detainee's "enemy combatant" status determination.

United States of America v. Omar Ahmed Khadr, No. 07-001 at 14 n.21 (C.M.C.R. 2007).

Moreover, in its analysis of the MCA's jurisdictional provisions, the CMCR noted that "Congress never stated that mere membership in or affiliation with the Taliban, al Qaeda, or associated forces was a sufficient basis for declaring someone to be an 'unlawful enemy combatant' for purposes of exercising criminal jurisdiction over that person." *Id.* at 16. Accordingly, the Prosecution's argument that a group assessment has already been made by the President precluding any need for an Article 5 hearing should be rejected.

In addition, Hamdan *denies* he is a member of al Qaeda. *See* Hamdan Affidavit, previously submitted as Attachment A to Defense Motion to Dismiss for Lack of Jurisdiction. Surely a contested allegation cannot be sufficient to strip a detainee of his right to an Article 5 hearing, given the significance of POW status under domestic and international law. If a party's obligations can be so easily avoided, then the protections of the GPW are largely illusory.

² As noted in the Defense's opening brief, the Supreme Court reserved the question of whether Hamdan could be tried by a military commission without an Article 5 hearing. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795 n.61 (2006). But in holding that, at a minimum, Common Article 3 applied, the Court rejected the Government's contention—repeated here in the Prosecution's reliance on the President's determinations—that the Geneva Conventions were entirely inapplicable.

C. To Obtain an Article 5 Hearing, a Detainee Only Needs to Assert POW Status

The Prosecution's next argument is that Hamdan has not identified the particular subpart of GPW Article 4 under which he could qualify as a POW, and therefore he has no right to ask for a status determination. Gov't Response at 6-7. But in seeking an Article 5 hearing, a detainee need not specify which subpart of Article 4 applies. All he need do is assert POW status—which Hamdan does in this case—to create the doubt necessary to trigger a hearing. This is reflected in Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (1997) ("AR 190-8"), which was "adopted to implement the Geneva Convention." *Hamdi v. Rumsfeld*, 542 U.S. 507, 550 (2004) (Souter, J., concurring).³ AR 190-8 § 1-6 provides:

1-6. Tribunals

a. In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

b. A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

Thus, the mere assertion of protected status is sufficient to afford the detainee GPW protection pending a status determination by a competent tribunal.

As noted in the Defense's opening brief, the Commission in this case has already

³ This regulation was jointly promulgated by the Headquarters of the departments of the Army, Navy, Air Force, and Marine Corps on October 1, 1997. The regulation explicitly states that its purpose is to implement international law as set forth in the GPW: "This regulation implements international law, both customary and codified, relating to EPW [enemy prisoners of war], RP [retained personnel], CI [civilian internees], and ODs [other detainees], which includes those persons held during military operations other than war. The principal treaties relevant to this regulation are: . . . (3) The 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW)." AR 190-8 § 1-1(b).

correctly determined that sufficient doubt concerning Hamdan's status exists to require an Article 5 hearing: "[T]here being doubt as to the accused's status under the law of war, he may not be tried by a Military Commission until his status is determined by a competent tribunal." 4 June 2007 Corrected Order at 3.

In any event, as the Prosecution concedes in a footnote, Hamdan has claimed POW status based (at least) on Article 4(A)(4), which affords such status to "persons who accompany the armed forces without actually being members thereof." Gov't Response at 7 n.4. The evidence (when finally disclosed to the Defense) may show that POW status can be asserted on other grounds as well. But that is the entire purpose of the status hearing—to review evidence concerning Hamdan's activities to allow for an assessment of whether he falls into any of the six categories of persons entitled to POW status under GPW Article 4.⁴

D. Hamdan's CSRT Did Not Inquire Into POW Status

The Prosecution next argues that even if Hamdan is entitled to an Article 5 hearing, his October 2004 CSRT already provided it. Gov't Response at 7-10. This is a reprise of the argument, urged by the Prosecution and rejected by both this Commission and the CMCR, that the CSRT already resolved the issue of the accused's "unlawful" enemy combatant status. The CMCR explained that the CSRT was never tasked with that inquiry. Instead,

The declared purpose of the C.S.R.T. process . . . was solely to afford detainees "the opportunity to contest designation as an enemy combatant." Wolfowitz memorandum at 1. The Wolfowitz memorandum never discusses addressing the issue of "lawful" or "unlawful" enemy combatant status; nor does the memorandum from the Secretary of the Navy implementing the C.S.R.T. process.

Khadr, CMCR 07-001 at 15-16. For this reason, the CMCR concluded that CSRT findings of

⁴ The Defense notes the *Amicus* Brief filed by Frank Fountain, Madeline Morris, and the Duke Guantanamo Defense Clinic: Margarita Clarens, Jason Cross, Allison Hester-Haddad, Nora Keiser [on behalf of Duke Guantanamo Defense Clinic], and hereby cites and endorses it in accordance with M.C.T.J. RC 7.5a(1). The Defense believes the brief is relevant to the issues raised by the Defense motion. The *amicus* brief is appended to this Reply as Attachment A.

combatancy did not satisfy the MCA's jurisdictional requirement of a showing of "unlawful" enemy combatant status. *Id.* at 12-16.


Precisely the same reasoning refutes the Prosecution's argument that Hamdan has already been provided with an Article 5 hearing. The CSRT was not established to address the detainee's status under the Geneva Conventions. It did not inquire into whether a detainee fell into any of the six categories of persons protected under GPW Article 4. It is entirely likely that an individual could be both an "enemy combatant"—as found by a CSRT—and also fall into one of the protected categories under GPW Article 4. Indeed, one might expect most "enemy combatants" to do so. Accordingly, the Prosecution's argument should be rejected.

E. The Defense Agrees That This Commission Is a Competent Tribunal for Purposes of an Article 5 Hearing


Finally, the Prosecution maintains that if Hamdan has not already received an Article 5 hearing at his CSRT, then "the Military Judge himself may provide it" at a pretrial hearing. Gov't Response at 10-11.

The Defense agrees with this assessment by the Prosecution. Indeed, the entire point of the Defense motion was, and is, to request that this Commission conduct an Article 5 hearing on a pretrial basis.⁵

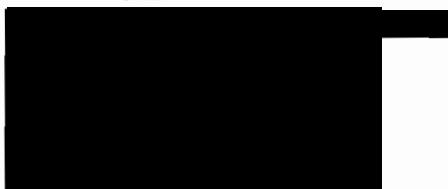
Respectfully submitted,

By: 
LT BRIAN L. MIZER, JAGC, USN
Detailed Defense Counsel
ANDREA J. PRASOW
Assistant Defense Counsel



PROF. CHARLES SWIFT
Emory School of Law
()
Civilian Defense Counsel

HARRY H. SCHNEIDER, JR.
JOSEPH M. MCMILLAN
Perkins Coie LLP



⁵ The Prosecution also takes issue with the Defense over the burden of proof necessary to show unlawful enemy combatant status at the December 5 hearing. Gov't Response at 2-3. Because the question of lawful combatant immunity overlaps entirely with the jurisdictional issue under the MCA—i.e., whether the Commission has jurisdiction to try the accused at all—the CMCR's instruction concerning the heightened standard of proof to rebut a claim of lawful immunity should be applied at the moment the issue first arises. Moreover, the reference in the CMCR's opinion to "[d]etermining lawful and unlawful combatant status under existing international treaties, customary international law, case law precedent (both international and domestic), and the MCA" as "a matter well within the professional capacity of a military judge," *Khadr*, CMCR 07-001 at 7, suggests the time for applying the standard is at a pretrial hearing. This is certainly more efficient than litigating the issue twice under different legal standards. In any event, because this dispute over the correct burden of proof deals with standards to be applied at the status hearing itself rather than for the resolution of this motion, the Commission can order the Article 5 hearing without resolving the burden of proof issue at this time.

Attachment A

UNITED STATES v. SALIM AHMED
HAMDAN

BEFORE A MILITARY COMMISSION
CONVENED PURSUANT TO THE
MILITARY COMMISSIONS ACT OF 2006

November 28, 2007

*Amicus Brief filed by
Frank Fountain, Madeline Morris, and the
Duke Guantanamo Defense Clinic: Margarita
Clarens, Jason Cross, Allison Hester-Haddad,
Nora Keiser
[on behalf of Duke Guantanamo Defense
Clinic]*

1. My name is Frank Fountain. I certify that I am licensed to practice before the Supreme Court of Georgia. I further certify:

a. I am not a party to any Commission case in any capacity, I do not have an attorney-client relationship with any person whose case has been referred to a Military Commission, I am not currently nor am I seeking to be *habeas* counsel for any such person, and I am not currently nor am I seeking to be next-friend for such person.

b. I certify my good faith belief as a licensed attorney that the law in the attached brief is accurately stated, that I have read and verified the accuracy of all points of law cited in the brief, and that I am not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

2. **Issues Presented.** The issue presented is whether the commission has personal jurisdiction over Salim Hamdan under the Military Commissions Act of 2006.

3. **Statement of Facts.** This commission dismissed charges against Salim Hamdan on June 4, 2007 for lack of jurisdiction. Following the jurisdictional ruling of the Court of Military Commissions Review in U.S. v. Khadr, CMCR 07-001 (2007), and this commission's order of October 18, 2007, this commission will now consider whether it has jurisdiction to proceed with criminal proceedings in U.S. v. Hamdan.

4. The Law.

Under the MCA, an al Qaeda member who was part of a militia or volunteer corps, belonging to the regular armed forces of Afghanistan, which was under responsible command, wore a fixed distinctive sign recognizable at a distance, carried arms openly, and abided by the law of war, is a lawful enemy combatant and not subject to the jurisdiction of this military commission.

The MCA states that the term “lawful enemy combatant” means a person who is—

- (A) a member of the regular forces of a State party engaged in hostilities against the United States;
- (B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or
- (C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

10 U.S.C. § 948a(2).

Under the clear language and explicit intent of the MCA, then, if a combatant is a member of the regular armed forces of a state, that individual is a lawful combatant without the need to meet any further conditions or requirements—and a member of a militia or volunteer corps belonging to those regular armed forces is, likewise, a lawful combatant if the irregular force in question complies with the four conditions specified. 10 U.S.C. § 948a(2)(B).

The MCA states that the term “‘unlawful enemy combatant’ means a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces).” 10 U.S.C. § 948a(1)(i). To interpret that definition of “unlawful combatant” under the MCA as pronouncing a blanket exclusion of all Taliban, al-Qaeda, or associated forces from lawful combatant status, as the government has at times argued, would render incoherent the entire structure of the MCA.

The MCA recognizes, consistent with the law of war, that a Taliban member might be a lawful or unlawful combatant, depending upon the period during which he was a combatant. When the Taliban was in governmental power in Afghanistan, Taliban forces were the regular armed forces of Afghanistan. Taliban members captured at that time are entitled to lawful combatant status. Taliban members captured *after* the Taliban fell from power, by contrast, are not entitled to lawful combatant status, since they were not members of the regular armed forces of a state at the time of their capture.

That the Taliban was not recognized by the US as the government of Afghanistan is irrelevant to the analysis. Entitlement to lawful combatant status, under the MCA as under the Geneva Conventions, extends to all regular armed forces of a state, regardless of whether the government in power in that state is recognized by the detaining power. This is clearly reflected in MCA art 948(a)(2)(C), which states: “The term ‘lawful enemy combatant’ means a person who is . . . a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.” 10 U.S.C. § 948a(2)(C). See also GC III, art 4(A)(3).

In sum, the MCA recognizes and takes into account that different Taliban combatants may have different combatant statuses. The statute reflects that some captured Taliban detained by the US are entitled to POW status, and some are not, and that designation of the status of Taliban combatants, therefore, requires a factual determination in each instance. The MCA, therefore, specifically notes, in §948a(1)(i), that all those who come within the MCA’s definition of “unlawful combatant” shall be so designated, including those fitting the definition who are among “Taliban, Al Qaeda, and associated forces.”

The status of Taliban forces as lawful combatants during the period when Taliban constituted the regular armed forces of Afghanistan has definitive ramifications for the combatant status of *non*-Taliban combatants. Under the MCA, for any *irregular* forces to be considered lawful combatants in a given armed conflict, those irregulars must “belong to” the state party to the conflict. The MCA defines as a lawful combatant “a member of a militia, volunteer corps, or organized resistance movement *belonging to* a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war.” 10 U.S.C. § 948a(2)(B). If there were never any lawful *Taliban* combatants, then there could never have been *any* lawful combatants, whatsoever, in the conflict.

The MCA obviously anticipates that some individuals will come within its definition of lawful combatants. For that to occur, the Taliban combatants captured while they were the regular armed forces of Afghanistan must be recognized as lawful combatants, as is provided for by the MCA, § 948a(2)(C). And, members of irregular forces – al Qaeda or otherwise – belonging to the regular armed forces of Afghanistan, if those forces complied with the four conditions specified, also must be recognized as lawful combatants under the MCA. MCA, art. 948(a)(2)(b).

The MCA, read in this manner, is a coherent document that reflects and accounts for a complex factual situation. An interpretation excluding all Taliban or al Qaeda combatants from lawful combatant status, by contrast, would make nonsense of much of the MCA, making all of its provisions concerning combatant status superfluous, and its jurisdictional limitations virtually meaningless.

Blanket exclusion of all Taliban and al Qaeda combatants from lawful combatant status would lead to an absurd result.

As discussed immediately above, if the MCA defined *all* Taliban and al Qaeda members as *unlawful* combatants, then there would be, by definition, no lawful combatants in the very population whose treatment the MCA was designed, written, and enacted to govern. Were this court to adopt that interpretation, the entire category of “lawful combatants,” which Congress painstakingly distinguished and excluded from military commission jurisdiction, would be a null set. The framework of military commission jurisdiction articulated in the MCA—carefully defining and distinguishing between lawful and unlawful combatants—would be rendered superfluous and meaningless. Congress did not intend to legislate a meaningless distinction with an absurd result. This court, accordingly, should not accept an interpretation of the MCA that would have that effect. A statute should be read, if possible, in a way that does not render its provisions absurd. *Public Citizen v. Dept. of Justice*, 491 U.S. 441 (1989).

Pursuant to clear and centuries-old US Supreme Court precedent, the MCA can and should be interpreted in a manner consistent with the international law of war.

“An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). This rule of statutory interpretation is premised on the assumption that Congress ordinarily seeks to follow customary international law when legislating. *F. Hoffman-La Roche, Ltd v. Empagran S.A.*, 542 U.S. 155, 164 (2004). Any ambiguity in the statute should be resolved in favor of compliance with international law and our obligations thereunder. *Cf. McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). Ingrained in US jurisprudence, this canon directing courts to interpret federal law to avoid violating our international obligations has been relied upon for over two centuries. *See, e.g., Charming Betsy*, 6 U.S. at 118; *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (relying upon customary

international law in determining the statutory construction of the Jones Act in a maritime tort case); *Empagran*, 524 U.S. at 166 (looking to customary international law in interpreting the Sherman Act and concluding that it did not apply to a foreign price-fixing claim).

The distinction between lawful and unlawful combatants is a central feature of the law of war. The MCA's categories of lawful combatants are drawn directly from the Geneva Conventions of 1949, Article 4(A)(1, 2). Under the MCA, as under the GCs, membership in a state's regular armed forces itself establishes lawful combatant status, without any further conditions. Irregular forces "belong[ing] to" a state party to the conflict are to be considered lawful combatants if those forces comply with the four conditions specified.

It was entirely foreseen by the negotiators of the GCs that it would at times be distasteful to acknowledge the POW status of the regular armed forces of governmental regimes that the US does not recognize. Preparing in advance to resist the temptation to make ad hoc decisions about the POW status of regular armed forces of the enemy, the US agreed with its negotiating partners in 1949 that "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power" are nevertheless to be considered lawful combatants. GCIII art 4(A)(3). Similarly, the carefully deliberated decision was made to afford POW protections to irregular forces belonging to any regular armed forces if the irregular forces complied with the four conditions specified.

It is now time to honor those commitments that the US has made under the law of war and, thereby, to uphold the law-of-war protections for our own personnel in the event of their capture in the future. If the evidence shows that Salim Hamdan was a member of a militia or volunteer corps belonging to the Taliban at a time when the Taliban constituted the regular armed forces of Afghanistan, and if that militia or volunteer corps of which he was a member

complied with the four conditions specified in MCA art. 948(a)(2)(B), then this commission must find Salim Hamdan to be a lawful combatant and, as such, not subject to the jurisdiction of this commission.

Respectfully Submitted,

Frank W. Fountain

Frank Fountain, Esq.

LTC, JAGC, U.S. Army (Ret.)

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Madeline Morris

Professor of Law

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

From: Prasow, Andrea, Ms, DoD OGC
Sent: Friday, November 30, 2007 1:29 PM
To: [REDACTED]
Cc: [REDACTED]; Schneider, Harry (Perkins Coie); 'McMillan, Joseph M. (Perkins Coie)'; [REDACTED].com; Mizer, Brian, LT, DoD OGC; [REDACTED], DoD OGC; David, Steven, COL, DoD OGC; Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD OGC; [REDACTED], [REDACTED]
[REDACTED] U.S. v. Hamdan - Defense Reply re Motion for Article 5 Status Determination
Attachments: Defense Reply to Article 5 Motion.DOC; Defense Reply to Article 5 Motion.pdf

LTC [REDACTED],

Attached for filing in *United States v. Hamdan* please find the Defense Reply to Government Response to Defense Motion for Article 5 Status Determination, or, Alternatively, Dismissal for Lack of Personal Jurisdiction. The PDF version is signed and includes an attachment. The Word version is unsigned and does not include the attachment.

Respectfully submitted,
AJP

Andrea J. Prasow
Office of the Chief Defense Counsel

[REDACTED]



Defense Reply to
Article 5 Mot...



Defense Reply to
Article 5 Mot...

[REDACTED]

From: Prasow, Andrea, Ms, DoD OGC
Sent: Friday, November 30, 2007 11:56 AM
To: [REDACTED]
Cc: [REDACTED]; Schneider, Harry (Perkins Coie); McMillan, Joseph M. (Perkins Coie); [REDACTED]; Mizer, Brian, LT, DoD [REDACTED], LN1, DoD OGC; David, Steven, COL, DoD OGC; Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, [REDACTED]
Subject: U.S. v. Hamdan - Defense Submission re Motion by Press Petitioners
Signed By: [REDACTED]
Follow Up Flag: Follow up
Flag Status: Green
Attachments: Defense Submission re Motion by Press Petitioners.doc; Defense Submission re Motion by Press Petitioners.pdf

[REDACTED],

In accordance with CAPT Allred's email of 26 November 2007, attached please find the Defense Submission With Respect to Motion by Press Petitioners for Public Access to Proceedings. A signed version is attached as a PDF document and an unsigned version is attached in Word.

Respectfully submitted,
AJP

Andrea J. Prasow
Office of the Chief Defense Counsel
Office of Military Commissions

[REDACTED]

<<...>> <<...>>

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN



Defense Submission


With Respect to Motion by Press Petitioners for
Public Access to Proceedings


30 November 2007

1. **Timeliness:** This Submission is filed within the timeframe established by the military judge.
2. The Defense position on the referenced motion is that the relief should be granted, access should be made available, and the proceedings should be open to the press and public.

Respectfully submitted,

By: 
LT BRIAN L. MIZER, JAGC, USN
Detailed Defense Counsel
ANDREA J. PRASOW
Assistant Defense Counsel
Office of the Chief Defense Counsel
Office of Military Commissions


PROF. CHARLES SWIFT
Emory School of Law

Civilian Defense Counsel

HARRY H. SCHNEIDER, JR.
JOSEPH M. MCMILLAN
Perkins Coie LLP


Follow Up Flag:	Follow up
Flag Status:	Green

AE 48 (Hamdan)
Page 3 of 102

$v/r,$

-----Original Message-----

UDCIR

States v. Hamdan -- Motion by Press Petitioners

LTC

Counsel:

2. The "Motion" and its "Attachments" are forwarded herewith. I invite Counsel for each party to provide the Commission with the party's position on how the Commission should treat and respond to these documents. The parties may also provide, at their discretion, any further matters concerning the documents which they believe may be of assistance. Any responses are due NLT 1200 hours on 30 November, 2007.

Keith J. Allred
Captain, JAGC, US Navy
Military Judge

In -- Motion by Press Petitioners

LTC

[REDACTED] the Motion and Attachments for Hamdan.
 Michael J. Berrigan
 Deputy Chief Defense Counsel

([REDACTED]
F [REDACTED]

Subj [REDACTED] -- Motion by Press Petitioners

Dear Mr. Berrigan:

1. Thank you for agreeing to forward these papers for service and filing in the above-referenced commission. I understand that you will be forwarding these papers to the necessary parties and officials today.

2. Attached please find:

a. Motion by Press Petitioners for Public Access to Proceedings and Records

b. Attachments to Motion by Press Petitioners, including:

i.
Declaration of William Glaberson

ii.
Declaration of David Schulz

Sincerely,

Jacob Goldstein

Jacob P. Goldstein

Levine Sullivan Koch & Schulz

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

national security. Petitioners are five news organizations that seek nothing more than an extension of this transparency principle—making filings and written records available in the same manner as in a civilian court, so that the public can better understand events occurring in this tribunal.

Reporting on this prosecution is currently hampered by a lack of contemporaneous access to docketing information, motions and other filings with the tribunal, transcripts and orders entered in this case. Actions taken in private sessions and via undisclosed electronic mail communications further serve to shield developments in the case from public view. Such lack of transparency by a tribunal charged with determining the criminal culpability of a prisoner being held by the U.S. Government is contrary to both the letter and the spirit of the Military Commissions Act of 2006, 10 U.S.C. § 948a, *et seq.* (“MCA”). It also defeats interests of the press and public that are protected by the First Amendment of the United States Constitution due to the deep conviction of our Founding Fathers that official actions taken by the government must be subject to scrutiny and oversight by the People.

4. Burden of Proof.

A party advocating a restriction on the public right of access bears the burden of showing that access poses a direct threat to a compelling governmental interest. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (“*Press-Enterprise I*”); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 15 (1986) (“*Press-Enterprise II*”); *Lugosch v. Pyramid Co. of Onodaga*, 435 F.3d 110, 123-24 (2d Cir. 2006); *ABC, Inc. v. Stewart*, 360 F.3d 90, 106 (2d Cir. 2004); *Washington Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991).

5. Statement of Facts.

a. The military commissions at Guantanamo are the first to be conducted by the United States since World War II, and they have been the subject of intense, international

scrutiny and debate. To take just one example, when the commission held that it lacked jurisdiction because Salim Ahmed Hamdan (“Hamdan”) had not been found to be an “*unlawful* enemy combatant,” it prompted more than two hundred and fifty news reports about the ruling around the world. *See* Lexis search of Mega News, All (English, Full Text) database for (hamdan & guantanamo and date (geq (06/04/07) and leq (06/06/07))), 259 results. The commission’s ruling was instantly reported by the press in, among other places, Australia,¹ Ireland,² Singapore,³ Turkey,⁴ Britain,⁵ and Canada.⁶ Given this intense scrutiny, it is important that the proceeding not only be fair, but that it be perceived as fair—something that cannot happen if the public is not able to follow and understand the events as they transpire.

b. As described in greater detail in the accompanying declaration of William Glaberson, public access to these proceedings is being denied in several important respects, primarily including that:

- i) The public is not permitted access to the “Filings Inventory” of motions, requests for relief, and other written records filed with the tribunal, and there is no other place where it can obtain docketing information to learn about the issues being raised by the parties;
- ii) The public is not provided access to the actual motions and related filings by the parties—even the existence of a motion is not currently disclosed in any publicly accessible way—nor to orders and rulings by the military judge;

¹ *See, e.g.,* Geoff Elliott, *Blow for US as Terror Cases Collapse*, The Australian, June 6, 2007, at 10.

² *See, e.g.,* Denis Staunton, *White House to Decide Whether to Appeal Guantánamo Ruling*, The Irish Times, June 6, 2007, at 11.

³ *See, e.g.,* *Guantanamo Justice Th[r]own into Chaos*, TODAY (Singapore), June 6, 2007, at 12.

⁴ *Guantanamo Trials Screech To Halt*, Turkish Daily News, June 6, 2007.

⁵ *See, e.g.,* Tom Baldwin, *Guantanamo Ruling Puts Trials in Doubt*, The Times (London), June 5, 2007, at 35.

⁶ *See, e.g.,* Sheldon Alberts, *Ruling Stuns U.S. Prosecutors*, Winnipeg Free Press, June 5, 2007, at A1.

- iii) Various applications and arguments are apparently being made through email communications to which the public has no access and no public record is available disclosing actions taken through electronic communications;
- iv) Substantive issues apparently are being raised and addressed in closed Rule 802 conferences for which no transcripts or summaries are publicly available.

The fact that this information may be made available *after* the conclusion of this prosecution does not cure the harm done to the public's right of contemporaneous access to the proceedings in this case. The cumulative effect of the failure to provide access to a docket and the written material filed in the case is to deprive the press and public of the means to meaningfully monitor and understand events occurring in this proceeding.

6. Legal Basis for Relief Requested.

A qualified right of access to the proceedings of this tribunal—including the written proceedings and records—is expressly granted by the Military Commissions Act and independently mandated by the Constitution of the United States. The Press Petitioners recognize the potential for national security issues and questions of personal safety to arise in the conduct of this criminal prosecution in a military tribunal, but there have been no findings that these concerns require the wholesale denial of access to the pre-trial proceedings in this case. The discussion that follows explains the statutory and constitutional grounds for the access sought by the Press Petitioners, and the narrow relief they now request. Military tribunals have recognized the right of the press to be heard on such an application to enforce the public right of access. *See, e.g., ABC, Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997) (“[W]hen an accused is entitled to a public hearing, the press enjoys the same right and *has standing to complain if access is denied.*” (emphasis added)); *Denver Post Corp. v. United States*, Army Misc. 2004

1215 (A. Ct. Crim. App. Feb. 23, 2005) (noting “obvious” “procedural error” in closing proceedings before allowing newspaper’s counsel to address the issue).⁷

A. The Military Commissions Act of 2006 and its Implementing Regulations Require Open Proceedings and Records

In adopting the Military Commissions Act of 2006, Congress recognized the critical importance that these criminal proceedings be conducted in the open so the watching world would accept their validity. The MCA thus expressly mandates access by “the public” to all “proceedings” of any military commission, unless specifically delineated exceptions are found to apply. 10 U.S.C. § 949d(d)(1). The MCA permits a denial of access “*only* upon making *a specific finding* that such closure is *necessary* to — (A) protect information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities; or (B) ensure the physical safety of individuals.” 10 U.S.C. § 949d(d)(2) (emphasis added).

The statutory right of access is recognized and implemented in both the Regulation for Trial by Military Commissions (“Reg. MC” or the “Regulation”) and the Manual for Military Commissions (“Manual”) containing the Rules for Military Commissions (“RMC”). *See* Reg. MC 19-7(a) (“The sessions of military commissions shall be public to the maximum extent practicable.”); RMC 806(a) (“[M]ilitary commissions *shall* be publicly held.” (emphasis

⁷ It is widely recognized that the Press Petitioners have standing to enforce the access rights they assert here. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573-74 (1980); *Globe Newspaper v. Superior Court*, 457 U.S. 596, 609 n.25 (1982); *United States v. Valenti*, 987 F.2d 708, 711 (11th Cir. 1993) (Press has “standing to intervene for purposes of challenging its denial of access to the underlying litigation, even though it is otherwise not a party.”); *E.E.O.C. v. Nat’l Children’s Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998); *In re New York Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987); *United States v. Smith*, 776 F.2d 1104, 1111 (3d Cir. 1985). Even in criminal cases, where the rules of procedure do not contemplate intervention by a non-party, the press has been held to be entitled to intervene for the limited purpose of challenging the denial of access. *See, e.g., In re Associated Press*, 162 F.3d 503, 507 (7th Cir. 1998) (“[T]hose who seek access to such material have a right to be heard in a manner that gives full protection of the asserted right.”).

added)).⁸ Rule 806(b)(2) authorizes a military judge to close a “session of a military commission” only for limited purposes and only after making “essential findings of fact, appended to the record of trial.”

The MCA and its implementing regulations make clear that the public’s right of access extends beyond the “trial” to all aspects of the “proceeding” against an enemy combatant. The MCA at various times differentiates between “trial,” “pre-trial” and “post-trial” procedures, *e.g.* § 949a(a), but extends the public right of access in § 949d(d) more broadly to all “proceedings.” The Regulation and Manual similarly make plain that the “proceedings” open for public inspection include motion papers, rulings, and conference summaries that form the record. Under the Regulation, the right of access applies “from the swearing of charges, until the completion of trial or disposition of the case without trial,” Reg. MC 19-2, and extends specifically to all “[i]nformation that has become part of the record of proceedings of the military commission in open session,” and “[t]he scheduling or result of any stage in the judicial process.” Reg. MC 19-4(a)(3)-(4). Motions, rulings, and summaries of Rule 802 conferences are all required to be part of the Record of Trial, and hence expressly subject to the right of access.⁹ The Manual reflects this same understanding. It empowers the military judge to “exercise reasonable control over the proceedings,” RMC 801(a)(3), and then identifies pre-trial

⁸ This Rule defines “public” to include “representatives of the press, representatives of national and international organizations, ... and certain members of both the military and civilian communities.” RMC 806(a).

⁹ See Reg. MC 22-5(a)(5) (“All accompanying papers, to include stipulations, motions, briefs, appellate exhibits and copies, should, to the maximum extent practicable, be prepared in accordance with the standards noted above” for preparation of the record of trial for appellate review.); Reg. MC 17-4(e) (“A summary of the conference, including any matter resolved or agreed upon, will be entered into the record of proceedings by the military judge, either orally or in writing at the military judge’s discretion, at or before the next commission session in the case.”); RC 6.7b (Appellate exhibits, which include “[m]otions, briefs, responses, replies, checklists, written instructions by the Military Judge for the Commission members, findings and sentencing worksheets, and other writings used during motions practice,” RC 6.2d(1), “become part of the record once the Military Judge has directed that they be marked.”).

motions as being among the “proceedings” a judge controls. *See also* RMC 908(b)(8)(A) (motions not affected by order on appeal “may be litigated, in the discretion of the military judge, at any point in the proceedings”). The Rules of Court for Military Commissions were recently amended to also acknowledge a right of public access to the pleadings in this matter. *See* RC 3.9 (amended Nov. 2, 2007).

These statutory and administrative provisions plainly establish that the public right of access to proceedings of this tribunal extends to motions and other written records, from the filing of charges to the conclusion of the case. While not an absolute right, this statutory right can be overcome only upon specific judicial determination that information must be withheld for reasons of national security or personal safety.

B. The First Amendment Independently Protects the Public’s Right of Access to Proceedings and Records of Adjudicative Military Tribunals

1. The First Amendment Right of Access Extends to Military Commissions

The First Amendment independently “protects the public and the press from abridgement of their rights of access to information about the operation of their government.” *Richmond Newspapers*, 448 U.S. at 584 (Stevens, J., concurring) (recognizing First Amendment right of public access to criminal trials); *Globe Newspaper*, 457 U.S. at 604-06 (same); *Press-Enterprise I*, 464 U.S. at 508-10, 513 (recognizing First Amendment right of public access to *voir dire* proceedings); *Press-Enterprise II*, 478 U.S. at 10 (same as to preliminary hearings in a criminal prosecution). The scope of this qualified constitutional right was first defined by the U.S. Supreme Court in *Richmond Newspapers*, a case involving access to a criminal trial that the State of Virginia had conducted entirely in secret. A Virginia statute specifically granted the trial judge discretion to conduct a secret trial, but the Supreme Court held that the First Amendment

created an affirmative, enforceable constitutional right of access to certain government proceedings, such as a criminal trial.

The Court found this qualified First Amendment right to be implicit in the guarantees of free speech and press, just as the right of association, right of privacy, right to travel and the right to be presumed innocent are implicit in other provisions of the Bill of Rights.¹⁰ As the Court later put it in *Globe Newspaper Co. v. Superior Court*, the First Amendment right of access is based upon,

the common understanding that a “major purpose of that Amendment was to protect free discussion of governmental affairs.” By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.

457 U.S. at 604 (citation omitted). *Richmond Newspapers* “unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment.” 448 U.S. at 583 (Stevens, J. concurring). Under *Richmond Newspapers* and its progeny, this right of access exists where government proceedings and information historically have been available to the public, and public access plays a “significant positive role” in the functioning of government. *E.g.*, *Globe Newspaper*, 457 U.S. at 605-07; *Press-Enterprise II*, 478 U.S. at 8-9; *Washington Post*, 935 F.2d at 287-92. Under the “experience” and “logic” analysis applied by the Supreme Court, the right of access “has special force” when it carries the “favorable judgment of experience,” but what is “crucial” in deciding where an access right exists “is whether access to a particular government process is important in terms of that very process.” *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J.,

¹⁰ See *Richmond Newspapers*, 448 U.S. at 577 (Burger, J.) (the right of access is “assured by the amalgam of the First Amendment guarantees of speech and press” and their “affinity to the right of assembly”); *Id.* at 585 (Brennan, J., concurring) (“[T]he First Amendment – of itself and as applied to the States through the Fourteenth Amendment – secures such a public right of access.”).

concurring). *See also* *Globe Newspaper*, 457 U.S. at 605-06; *Press-Enterprise II*, 478 U.S. at 8-9; *United States v. Simone*, 14 F.3d 833, 837 (3d Cir. 1994); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1173 (3d Cir. 1986).

While this right has most frequently been asserted to compel access to judicial proceedings and documents, the right also applies to proceedings and information in the executive and legislative branches. *E.g.*, *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695-96, 700 (6th Cir. 2002) (right of access to executive branch deportation proceedings); *Whiteland Woods, L.P. v. Twp. of West Whiteland*, 193 F.3d 177, 181 (3d Cir. 1999) (municipal planning meeting); *Cal-Almond, Inc. v. U.S. Dep't of Agric.*, 960 F.2d 105, 108-10 (9th Cir. 1992) (Agriculture department voters list); *Soc'y of Prof'l Journalists v. Sec'y of Labor*, 616 F. Supp. 569, 574-75 (D. Utah 1985) (administrative hearing), *vacated as moot*, 832 F.2d 1180 (10th Cir. 1987).

Under the same experience and logic tests, a First Amendment right of public access attaches to proceedings of adjudicative military tribunals, including military commissions. *See, e.g.*, *United States v. Anderson*, 46 M.J. 728, 729 (A. Ct. Crim. App. 1997) (per curiam) (absent adequate justification clearly set forth on the record, “trials in the United States military justice system are to be open to the public”); *see also* *ABC, Inc. v. Powell*, 47 M.J. at 366 (First Amendment right of public access applies to investigations under Article 32); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (First Amendment right of public access extends to courts-martial); *United States v. Hershey*, 20 M.J. 433, 436 & 438 n.6 (C.M.A. 1985) (finding First Amendment right of public access to a court-martial proceeding); *United States v. Scott*, 48 M.J. 663, 665 (A. Ct. Crim. App. 1998) (same); *United States v. Story*, 35 M.J. 677, 677 (A. Ct. Crim. App. 1992) (per curiam) (same).

Historical Experience.¹¹ Our country has a tradition of public access to adjudicative military tribunals. William Winthrop, known as the “Blackstone of Military Law” (*Reid v. Covert*, 354 U.S. 1, 19 n. 38 (1957) (plurality opinion)), described in his classic opus on military law a history of open proceedings that dates back centuries:

Originally, (under the Carlovingian Kings,) courts-martial ... were held *in the open air*, and in the Code of Gustavus Adolphus ... criminal cases before such courts were required to be tried “*under the blue skies*.” The modern practice has inherited a similar publicity. With us, when once opened, the court-martial room—though at any stage of the trial it may be permanently closed at the discretion of the court—is, in general, continued open throughout the investigation, (except when the doors are closed for deliberation on interlocutory matters,) and also during the closing arguments of the counsel, or till the final clearing for judgment. While thus open the public is allowed to come and go much as in the civil courts. ... In general, ... reporters are freely admitted, and sometimes even special accommodation is provided for them.

William Winthrop, *MILITARY LAW AND PRECEDENTS* 161-62 (rev. 2d ed. 1920) (“Winthrop”). Based on this long tradition of access, military courts have recognized that “the right to a public trial includes the right of representatives of the press to be in attendance,” even before the Supreme Court recognized the First Amendment right of public access to criminal proceedings in *Richmond Newspapers. United States v. Brown*, 22 C.M.R. 41, 48 (C.M.A. 1956), *overruled, in part, on other grounds by United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977).

This tradition of public access to courts-martial also runs through the history of military commissions specifically. Commissions, after all, historically have “differed from the court-

¹¹ While history and policy are interrelated in the Supreme Court’s definition of the right of access, the absence of historical evidence would not defeat the right. In *Press Enterprise II*, the Court noted that the First Amendment right attached to pretrial proceedings even when they had “no historical counterpart,” but the “importance of the . . . proceeding” was clear. 478 U.S. at 10 n.3. See also *United States v. Criden*, 675 F.2d 550, 555 (3d Cir. 1982) (right of access applies to pretrial proceedings even where public had no common law right to attend); *United States v. Chagra*, 701 F.2d 354, 363 (5th Cir. 1983) (lack of historic record of access to bail proceedings does not bar recognition of a First Amendment right of access).

martial only in terms of jurisdiction.” David Glazier, Notes, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 Va. L. Rev. 2005, 2092 (2003).

As the Supreme Court explained:

[T]he procedures governing trials by military commission historically have been the same as those governing courts-martial. ... The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter. *See* Winthrop 831. Exigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections. That history explains why the military commission’s procedures typically have been the ones used by courts-martial.

Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2788, 2792 (2006).¹²

While there have been some notable exceptions, there have been military commissions throughout our nation’s history conducted publicly:

- During the Civil War, for example, the members of the 1864 military commission of Lambdin P. Milligan and others retired from the room to deliberate in order “to avoid the inconvenience of dismissing *the audience assembled to listen to the proceedings*.” Winthrop, 289 (emphasis added and internal quotation marks omitted).
- The military commission established to try John Wilkes Booth’s co-conspirators in Lincoln’s assassination was opened to the public after reporters complained and Gen. Ulysses S. Grant “led them to the White House to talk to the president.” *See* James Johnston, *Swift and Terrible: A Military Tribunal Rushed to Convict After Lincoln’s Murder*, Wash. Post, Dec. 9, 2001, at F1.¹³

¹² The United States Court of Military Commission Review just recently recognized that Congress intended the procedures and practices of military commissions to “mirror” those of courts-martial, and that the procedures herein “are based upon the procedures for trial be general courts-martial.” *United States v. Khadr*, CMCR 07-001 at 23 & n. 35 (Sept. 24, 2007) (quoting M.C.A. §§ 949a(a) & 948b(c)).

¹³ The openness of these Civil War era commissions is particularly significant in light of the rampant suppression of the freedom of the press and “gross violations of the First Amendment” that otherwise occurred during the Civil War era. *See* William H. Rehnquist, *ALL THE LAWS BUT ONE* 221 (1998) (“Rehnquist”).

- The military commission to try General Tomoyuki Yamashita in 1945 was also open to the press and public. See The Comm. on Commc'ns & Media Law of the Ass'n of Bar of City of New York, *The Press & the Public's First Amendment Right of Access to Terrorism on Trial: A Position Paper*, 22 Cardozo Arts & Ent. L.J. 767, 790 (2005).
- The military commissions established by the U.S. at Dachau were, like the international tribunal at Nuremberg, open to the press and public, with "more than four hundred spectators crowd[ing] into the courtroom on" the opening day. See Joshua M. Greene, JUSTICE AT DACHAU: THE TRIALS OF AN AMERICAN PROSECUTOR 39 (2003); *id.* at 245 (noting that judge denied defense request to prohibit press from photographing the accused).

While a 1942 trial of Nazi saboteurs found in the United States was famously conducted in secret, that precedent shows how secrecy can be counterproductive in the long run. It is now widely believed that the "real reason President Roosevelt authorized these military tribunals was to keep evidence of the FBI's bungling of the case secret."¹⁴

Despite this episode, the historical trend in both the civilian and military justice systems has been towards increasing sensitivity to civil liberties.¹⁵ See, e.g., *Weiss v. United States*, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring) ("Today's decision upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history"). Chief Justice Rehnquist also noted the "'generally ameliorative trend' in civil liberties during wartime." Jack Goldsmith, Cass R. Sunstein, *Military Tribunals*

¹⁴ Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Senate Comm. on the Judiciary, 107th Cong. 377 (Nov. 28, 2001) (statement of Neal Katyal, Visiting Professor, Yale Law School, and Professor of Law, Georgetown University), available at http://judiciary.senate.gov/testimony.cfm?id=126&wit_id=72 (last visited Nov. 20, 2007).

¹⁵ The U.S. State Department repeatedly has criticized the use of secret military tribunals by other countries. See Press Release, Human Rights Watch, *Fact Sheet: Past U.S. Criticism of Military Tribunals* (Nov. 28, 2001), available at <http://www.hrw.org/press/2001/11/tribunals1128.htm> (last visited Nov. 20, 2007). For example, the State Department has criticized Burma, "where trials are not open to the public and military authorities dictate the verdicts"; China, where trials are often conducted in secret; Kyrgyzstan, where "[o]pposition leaders have been tried in closed military courts"; Peru, where secret military trials have been held, including the 1996 prosecution of Lori Berenson; Russia, where Edmond Pope's "trial took place behind closed doors"; Sudan, where military trials are sometimes secret and brief; and Turkey, where the State Security Courts hold closed hearings. *Id.*

and Legal Culture: What a Difference Sixty Years Makes, 19 Const. Comment. 261, 286 (2002) (quoting Rehnquist, 219-221). In light of this trend, as one scholar put it: “Conducting military commission trials today that fall short of both their historic purposes and contemporary standards of justice is likely to stain the reputation of both the American military and the American justice system as a whole.” Glazier, 89 Va. L. Rev. at 2093.

Policies Advanced by Public Access. The logic prong of the Supreme Court’s test for access is readily met. In recognizing the constitutional right to attend criminal proceedings, the Supreme Court identified at least five distinct interests advanced by open adjudicatory proceedings each of which applies to criminal proceedings in this forum as well: (1) ensuring that proper procedures are being followed; (2) discouraging perjury, misconduct of participants, and biased decisions; (3) providing an outlet for community hostility and emotion; (4) ensuring public confidence in a trial’s results through the appearance of fairness; and (5) inspiring confidence in government through public education regarding the methods followed and remedies granted by government. See *Richmond Newspapers*, 448 U.S. at 569-71.

Concurring in *Richmond Newspapers*, Justice Brennan explained, eloquently, the crucial structural role that public access plays in the proper functioning of our nation’s criminal justice system: “Open trials are bulwarks of our free and democratic government: public access to court proceedings is one of the numerous ‘checks and balances’ of our system, because ‘contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.’” *Id.*, at 592 (Brennan, J., concurring) (quoting *In re Oliver*, 333 U.S. 257, 271 (1948)).

The very same policy arguments that mandated the constitutional right of access to criminal trials in the civilian court system apply to criminal trials conducted by the Department

of Defense. Any “adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny.” *Lugosch*, 435 F.3d at 124 (quoting *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982)). Like other adjudicatory proceedings, military commissions are presided over by an impartial arbiter, judgment is based on a record created by the tribunal through an adversarial process that involves the presentation of evidence and the opportunity to cross-examine witnesses. In this setting, public access improves the performance of all involved, protects judges and prosecutors from claims of dishonesty, and provides a forum for the education of the public. See The Comm. On Commc’ns & Media Law of the Ass’n of the Bar of the City of New York, “*If it Walks, Talks and Squawks . . .* ”*The First Amendment Right of Access to Administrative Adjudications: A Position Paper*, 23 Cardozo Arts & Ent. L.J. 21, 25 (2005). Just as with other types of military tribunals, an open proceeding “reduces the chance of arbitrary or capricious decisions and enhances public confidence,” which would “quickly erode” if proceedings are arbitrarily closed. *Scott*, 48 M.J. at 665 (citations and internal quotation marks omitted); see also *Anderson*, 46 M.J. at 731 (same).

Indeed, judges within the military justice system have long recognized that openness significantly assists the functioning of the adjudicative process. “A public trial is believed to effect a fair result by ensuring that all parties perform their functions more responsibly, encouraging witnesses to come forward, and discouraging perjury.” *Hershey*, 20 M.J. at 436. Even before the Supreme Court recognized the right of access to criminal proceedings in *Richmond Newspapers*, the Court of Military Appeals had identified the functional benefits of public proceedings: (1) improving the quality of testimony; (2) curbing abuses of authority; and (3) fostering greater public confidence in the proceedings. See *Brown*, 22 C.M.R. at 45-48. As explained by Professor Wigmore in his seminal treatise quoted in *Brown*, “[n]ot only is respect

for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.” Wigmore, Evidence § 1834 (3d ed.), *quoted in Brown*, 22 C.M.R. at 45; *see also United States v. Hood*, 46 M.J. 728, 731 n.2 (A. Ct. Crim. App. 1996).

The vital role that openness plays in ensuring public respect for the results produced by an adjudicative process is perhaps best demonstrated by considering the converse:

Secret hearings – though they be scrupulously fair in reality – are suspect by nature. Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court’s decision sealed from public view.

Gannett Co. v. DePasquale, 443 U.S. 368, 429 (1979) (Blackmun, J., concurring in part and dissenting in part).¹⁶

For all the reasons cited in *Brown*, and in the unbroken chain of precedents issued by United States military tribunals since *Brown*, openness of adjudicative military bodies, including the military commissions, promotes the functioning of those bodies, thereby satisfying the logic prong of the *Press Enterprise II* analysis.

2. The First Amendment right of access extends to the written records of this proceeding including docketing information, motions, transcripts and orders.

Although the United States Supreme Court has never expressly discussed the application of the First Amendment right of access to the *records* of criminal proceedings, *but see Press-*

¹⁶ *See also Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring):

Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and open reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.

Enterprise I, 464 U.S. at 512-13 (holding that First Amendment right applies to written transcript of closed proceeding), federal and state courts have widely concluded that the First Amendment right extends to court records in criminal cases. *See, e.g., Washington Post*, 935 F.2d at 287-88 (holding that First Amendment right of access attaches to plea agreement); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502-04 (1st Cir. 1989) (same for sealed criminal court files); *Seattle Times Co. v. U.S. Dist. Court*, 845 F.2d 1513, 1515-17 (9th Cir. 1988) (documents relating to pretrial release hearing); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) (search warrant affidavits); *United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988) (plea agreement); *In re Storer Commc'ns, Inc.*, 828 F.2d 330, 336 (6th Cir. 1987) (motion to recuse judge); *In re New York Times Co.*, 828 F.2d at 114 (pre-trial suppression motion); *In re Washington Post Co.*, 807 F.2d 383, 389-90 (4th Cir. 1986) (plea and sentencing materials); *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (all pretrial court filings). The same policies advanced by access to records in these cases apply fully to the records of military commissions. The Rules of Court provide that records are not sealed unless the military judge orders that they “should not be released in the interests of ensuring the parties receive a fair trial or for other reasons.” RC 8.3.¹⁷

Indeed, some courts have held, as a matter of logic, that the First Amendment right of access necessarily embraces all judicial records that serve as the basis for, or lie at the heart of, a judicial *proceeding* that is itself subject to a First Amendment right of access, without applying the “experience and logic” test separately to document access. The Ninth Circuit adopted this

¹⁷ Indeed, the Court of Military Commission Review assumes that the military commissions are providing contemporaneous access to documents in the proceedings. *See* CMCR Rule of Practice 30 n.30 (“This Rule is designed to disclose to the public how filings made to the CMCR and the CMCR’s decision will be released or not released to the public. *Materials from the Commission hearings are being released by the Clerk of Court for Commissions.*” (emphasis added)).

approach in *Associated Press v. United States District Court*: “There is no reason to distinguish between pretrial proceedings and the documents filed in regard to them. Indeed, the two principal justifications for the first amendment right of access to criminal proceedings apply, in general, to pretrial documents.” 705 F.2d 1143, 1145 (9th Cir. 1983) (emphasis added). See also, e.g., *In re New York Times Co.*, 828 F.2d at 113-16 (constitutional right of access extends to written motions relating to any proceedings that are themselves subject to the constitutional right); *Lugosch*, 435 F.3d at 124 (same).

After all, “[a]n adjudication is a formal act of government, *the basis of which* should, absent exceptional circumstances, be subject to public scrutiny.” *Joy*, 692 F.2d at 893 (emphasis added).¹⁸ In many instances, access to the records that frame an issue for judicial resolution provides the only means by which the public can monitor the operations of government: “Access to written documents filed in connection with pretrial motions is particularly important in the situation . . . where no hearing is held and the court’s ruling is based solely on the motion papers.” *In re New York Times Co.*, 828 F.2d at 114. Indeed, the Rules of Court for Military Commissions contemplate that motions will typically be decided on papers, with no public hearing. See RC 3.8(a) (unless evidentiary hearing otherwise required, *all* motions are to be decided by the military judge “based upon the written filings of the parties”).

Courts have thus recognized a right of access to the same type of docketing information, filed materials and court rulings to which access is sought in this case:

¹⁸ *Joy v. North* addressed the scope of a common law right of access to court documents, which would also apply to the record of military tribunals given the historical tradition of access. See, e.g., *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978) (common law right of access to records in criminal cases); *United States v. El-Sayegh*, 131 F.3d 158, 161 (D.C. Cir. 1997) (common law right of access to judicial records antedates the constitutional right); *Stone v. Univ. of Maryland Med. Sys. Corp.*, 855 F.2d 178, 181 (4th Cir. 1988) (requiring public docket based on common law right of access to proceedings).

Docketing information. Courts have expressly concluded that refusing to provide docketing information constitutes a violation of the constitutional right of access. See *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004) (“[T]he ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible.”); *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1029-30 (11th Cir. 2005) (“[P]ublic docket sheets are essential to provide meaningful access to criminal proceedings.” (internal quotation marks omitted)); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897-98 (7th Cir. 1994) (holding that the district court erred in sealing, *inter alia*, the civil docket for a case); *Washington Post*, 935 F.2d at 289 (striking down a trial court’s practice of failing to publicly docket certain filings in criminal cases); *In re State-Record Co.*, 917 F.2d 124, 128-29 (4th Cir. 1990) (requiring public docketing of a criminal case because of the constitutional right of access); *In re Search Warrant for Secretarial Area Outside Offices of Gunn*, 855 F.2d at 575 (reversing order sealing docket entries). As the Second Circuit observed in *Pellegrino*, “[p]recisely because docket sheets provide a map of the proceedings in the underlying cases, their availability greatly enhances the appearance of fairness.” 380 F.3d at 95. In this case, there is no basis for withholding access to the Filings Inventory, which is neither classified nor otherwise protected. See RC 5.3c (“The names given to matters that may appear on the Filings Inventory - such as the subject of a motion - will not be classified or otherwise protected as the Filings Inventory is intended to be transmitted through unsecured networks.”).

Motions and Related Filings. The First Amendment affords the public a right to access the memoranda of law that attorneys must file in support of their substantive motions. *In re Providence Journal Co.*, 293 F.3d 1, 10-13 (1st Cir. 2002). Courts have widely recognized a constitutional right of public access to motions, and accompanying exhibits, in criminal cases.

See *In re New York Times Co.*, 828 F.2d at 114 (First Amendment right of access attaches to pre-trial motions and exhibits in criminal case); *In re Storer Commc'ns*, 828 F.2d at 336 (First Amendment right of access attaches to motions seeking recusal of judge); *In re Knight Publ'g Co.*, 743 F.2d 231, 235-36 (4th Cir. 1984) (reversing order sealing motions and affidavits filed in criminal trial).

Transcripts. The public's constitutional right to attend judicial proceedings guarantees a concomitant right to obtain transcripts of those proceedings. See, e.g., *Press Enterprise I*, 464 U.S. at 512-13 (holding that judge's order denying access to a transcript of the *voir dire* was a violation of the First Amendment right to attend judicial proceedings); *United States v. Brooklier*, 685 F.2d 1162, 1172 (9th Cir. 1982) (same with respect to transcript of suppression hearing; "the denial of the motion to release the transcripts was itself a denial of the right of access protected by the first amendment.").

Orders. The constitutional right has also specifically been held to apply to orders entered in connection with public proceedings. E.g., *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 663-64 (3d Cir. 1991); *In re Continental Illinois Secs. Litig.*, 732 F.2d 1302, 1308-09 (7th Cir. 1984).

C. The Public Right of Access Is Improperly Infringed by Procedures Currently Being Followed By This Tribunal.

The First Amendment right of access is a qualified, not an absolute, right. The qualified right can be overcome where there exists a countervailing interest of "transcendent" importance that requires a restriction of the access right. E.g., *Richmond Newspapers*, 448 U.S. at 581; *Globe Newspaper*, 457 U.S. at 606-07. To justify closure or sealing, a court must make *specific factual findings*, on the record, that closure or sealing "is essential to preserve higher values and is narrowly tailored to serve that interest." E.g., *Press-Enterprise II*, 478 U.S. at 13-14 (internal

quotation marks omitted). Petitioners do not dispute that issues of national security or personal safety can constitute higher values that may warrant restrictions on access in appropriate circumstances. However, if access is to be denied, judicial findings on the need for closure must be entered as written findings of fact, made with sufficient specificity to allow appellate review. *Id.* at 9-10, 14; *In re Time, Inc.* 182 F.3d 270, 271 (4th Cir. 1999).

The adjudicatory tribunals of the military branches have applied this same standard. As explained in *Hershey*, “the party seeking closure must advance an overriding interest that is likely to be prejudiced [by openness]; the closure must be narrowly tailored to protect that interest; the trial court must consider reasonable alternatives to closure; and it must make adequate findings supporting the closure to aid in review.” 20 M.J. at 436; *see also Anderson*, 46 M.J. at 729 (“[T]he military judge placed no justification on the record for her actions. Consequently, she abused her discretion in closing the court-martial.”). The Army Court of Military Appeals has also applied this standard as the substantive prerequisite for a court to enter a “protective order” limiting public access to documents admitted into evidence in a court martial proceeding. *See Scott*, 48 M.J. at 665.

Given the statutory and constitutional access rights pertaining to this tribunal, Petitioners respectfully submit that they should be granted timely access to docketing information such as maintained on the non-classified Filings Inventory, motions and related filings by the parties, transcripts of proceedings and rulings in this case. The possibility that this information may be disclosed months—or years—in the future, after the conclusion of the proceeding, is insufficient. The right of access conveys a right of *contemporaneous* access. *See, e.g., Lugosch*, 435 F.3d at 126-27 (“Our public access cases and those in other circuits emphasize the importance of *immediate* access when a right of access is found.” (emphasis added)); *Grove Fresh Distribs.*,

Inc., 24 F.3d at 897 (access to court documents “should be immediate and contemporaneous”); *Republic of the Philippines*, 949 F.2d at 664 (“[T]he public interest encompasses the public’s ability to make a *contemporaneous* review of the basis of an important decision of the district court.” (emphasis added)); *Washington Post*, 935 F.2d at 287 (recognizing “the critical importance of contemporaneous access . . . to the public’s role as overseer of the criminal justice process”); *Valley Broad. Co. v. U.S. Dist. Ct.*, 798 F.2d 1289, 1292 (9th Cir. 1986) (noting that because the Press “seeks to obtain the tapes for contemporaneous broadcast when presumably they will pack the greatest punch, delay will prejudice its application in a way not correctable on appeal” (internal quotation marks omitted)); *Continental Illinois Secs. Litig.*, 732 F.2d at 1310 (“[T]he presumption of access [to court records] normally involves *contemporaneous* access.”); *In re Application of National Broadcasting Co.*, 635 F.2d 945, 952 (2d Cir. 1980) (“[T]here is significant public interest in affording [opportunity to scrutinize evidence] contemporaneously . . . when public attention is alerted to the ongoing trial.”).

Courts have thus repeatedly upheld claims of an access right to pre-trial proceedings and court filings over the objections of a defendant that jury prejudice may result. *E.g.*, *Associated Press v. U.S. Dist. Court*, 705 F.2d at 1147 (delay of release of filed documents for 48 hours violates right of access); *Brooklier*, 685 F.2d at 1172-73 (holding that delay in release of transcript of closed suppression hearing until end of trial violated right of access to attend judicial proceedings); *see also Simone*, 14 F.3d at 842 (holding that ten-day delay in release of transcript of closed hearing violates the press’ right of contemporaneous access). These courts apply the stringent test required to overcome the right of access—a test that would not need to be applied if a promise of *future* access resolved the constitutional concern. *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1072 (3d Cir. 1984) (“[A] district court . . . must not relax the standard

necessary to close a proceeding simply because a transcript of that closed proceeding can be made available at a later date.”) The suggestion that a complete record may ultimately be provided is simply no answer at all to the public’s right of contemporaneous access to docketing information and written materials filed in this proceeding.

The Rules of Court for these proceedings were amended this month, in recognition of the right of access, to state that “the Military Commissions Trial Judiciary [“MCTJ”] will facilitate release of materials included in the record of trial through appropriate channels, and in accordance with applicable regulations, *at the earliest appropriate time.*” RC 3.9a (emphasis added). The Rule recognizes the military judge’s “*sole* authority to determine whether or not any given matter shall be released,” RC 3.9c (citing RMC 801; Reg. MC 19-5, 19-6) (emphasis added), and establishes a procedure for the judge to forward suitable portions of the record to OMC “for appropriate redaction, coordination with the Assistant Secretary of Defense for Public Affairs, and release to the general public.” RC 3.9b.

Notably, the Rule is limited in scope and does not mandate contemporaneous or timely release. The Rules do not provide for mandatory release of the Filings Inventory, nor do they address the release of transcripts of the proceedings. With respect to motions and orders, the Rule states that the judge “*may* authorize forwarding of [related] pleadings” but only “[*a*]*fter* an order or ruling has been issued on a pending matter,” and all attachments (exhibits) to the pleadings are excluded. *See* RC 3.9c. Other information and documents, including “email threads, Appellate Exhibits, and Filings Inventories,” may similarly be forwarded when the judge so authorizes. RC 3.9c. As the Declarations tendered along with this Petition demonstrate, in practice this new rule has not yet proved successful in providing the public and the press with contemporaneous access to the court records of this Military Commission.

In resolving the scope of the public access right, Petitioners also request that steps be taken to ensure that substantive issues are not presented or resolved through email communications or closed-door sessions that would effectively circumvent the public's right of access. The parties in this case have filed motions by e-mail in the past, that are unavailable for public inspection. *See* Glaberson Decl. ¶¶ 17-20.

Petitioners are also concerned that Rule 802 conferences not be used to resolve substantive matters in a manner that defeats the right of access. As courts have recognized, holding "significant criminal proceedings behind closed doors—without notice to the public or any statement of reasons for the closure—is inconsistent with our open system of justice." *United States v. Alcantara*, 396 F.3d 189, 203 (2d Cir. 2005) (conducting plea and sentencing proceedings in judges' robing room held improper). *See also Capital Newspapers Div. v. Clyne*, 438 N.E.2d 1111, 1112 (N.Y. 1982) (reversing trial court's order closing hearing conducted outside jury's presence to consider admissibility of prior criminal acts).

Rule 802 allows conferences to be done off the record only if they are limited to "routine or administrative matters." *See* RMC 802(a) (discussion). The Manual and the Regulation make clear that Rule 802 conferences are not to be used "to litigate or decide contested issues." RMC 802(a) (discussion); *see also* Reg. MC 17-4(c) ("No legal issues will be litigated at an RMC 802 conference"). The Regulation further requires that the military judge enter a summary of the Rule 802 conference into the record "at or before the next commission session in the case." Reg. MC 17-4(e). *See, e.g., United States v. Thomas*, 32 M.J. 1024, 1026 (A.F.C.M.R. 1991) ("Conferences may be held 'to consider such matters as will promote a fair and expeditious trial,' RCM 802(a), but they are no substitute for litigation or inquiry on the record."); *see also United*

States v. Sadler, 29 M.J. 370, 373 n.3 (C.M.A. 1990) (“Discussion of instructions should be conducted on the record, rather than in a conference under RCM 802”).¹⁹

D. This Petition Should be Resolved *Forthwith*, To Avoid Further Deprivation of The Right of Public Access

As the Supreme Court observed in *Nebraska Press Association*, “[d]elays imposed by the governmental authority” are inconsistent with the press’ “traditional function of bringing news to the public promptly.” 427 U.S. at 560-61. Because of the time sensitive nature of access to these proceedings, the Military commission should forthwith grant the relief sought in this Petition. Until the closure practices being challenged herein are rescinded, “each passing day may constitute a separate and cognizable infringement of the First Amendment.” *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1979) (Blackmun, J., in chambers) (quoting *Nebraska Press Ass’n v. Stuart*, 423 U.S. 1319, 1329 (1975) (Blackmun, J., in chambers)); *Lugosch*, 435 F.3d at 126-27 (noting, in context of action by news media seeking access to judicial records, that the “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury” (internal quotation marks omitted)). Indeed, military courts have stayed Article 32 proceedings that have been closed and expedited review of the closure orders precisely because “awaiting relief in the ordinary course of appellate review would be an inadequate remedy to preserve the public interest” *Denver Post Corp.*, Army Misc. 2004 1215 at 6 (lifting stay of Art. 32 proceeding only upon release of redacted transcript of improperly closed portion); see *ABC, Inc. v. Powell*, 47 M.J. at 364 (granting immediate Writ of Mandamus directing Art. 32 proceedings to be opened even before issuance of written decision).

¹⁹ Although the court in *United States v. McQuinn* stated, “[N]either this court nor our superior court have considered any given topic ‘off limits’ in an RCM 802 conference setting,” the court there held that the relevant inquiry is the sufficiency of the inquiry conducted on the record and did not address the possibility of a denial of public access. 47 M.J. 736, 738 (N-M.Ct. Crim. App. 1997).

7. Oral Argument.

Petitioners believe this motion can most promptly be resolved on papers.

8. Witnesses.

Not applicable.

9. Conference.

Petitioners certify that they have conferred with counsel for the parties concerning the relief requested herein. Counsel for the United States, William B. Britt, Lieutenant Colonel, U.S. Army Reserve, indicated that the prosecution believes OMC is releasing records in accordance with the rules and regulations and the prosecution will attempt to minimize as much as possible the delay involved in the review of matters implicating national security; counsel for defendant, Andrea Prasow, indicated that the defense supports procedures to insure an effective right of public access in a manner commensurate with a district court or a court-martial.

10. Additional Information.

None.

11. Attachments.

- a) Declaration of William Glaberson
- b) Declaration of David Schulz

WHEREFORE, the Press Petitioners respectfully ask this honorable tribunal to forthwith grant their Petition and to order public access to the Filings Inventory, together with all motions, exhibits and orders filed in this proceeding, and to enter an Order clarifying that all proceedings herein shall be open to the public and press unless specific findings are entered on the record that satisfy the statutory and constitutional standards for denying such public access.

Dated: November 21, 2007
New York, New York

LEVINE SULLIVAN KOCH & SCHULZ LLP

By: David A. Schulz
David A. Schulz (SE)
Steven D. Zansberg
321 West 44th Street, Suite 510
New York, NY 10036

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Attorneys for Press Petitioners

ATTACHMENT A

ACCESS PROVIDED BY THE OFFICE OF MILITARY COMMISSIONS

4. Since Congress passed the Military Commissions Act of 2006, military commissions have been convened to hear charges against three individuals: Omar Ahmed Khadr, Salim Ahmed Hamdan and David M. Hicks. Charges have been sworn against a fourth individual, Mohammed Jawad. The Office of Military Commissions ("OMC") has provided the public and press only limited access to the records of these proceedings through a Department of Defense website. (The website may be viewed at <http://www.defenselink.mil/news/commissions.html>.)

5. The DOD website does not provide timely information and does not permit a reporter to follow or understand developments on a prosecution. For example, as of November 19, 2007, the most recent entry under "Commission Cases" for both Omar Ahmed Kadr and Salim Ahmed Hamdan is the referral of charges on 04/24/07 and 05/10/07 respectively. No subsequent activity appears on the DOD website in either case. (A true and correct copy of the entries on the DOD website for the Khadr and Hamdan commissions are attached hereto as Exhibit A.)

6. The DOD press office separately has released motions and rulings on occasion, but none of the motion activity is reflected on the website for the commission, and the motion papers submitted to this tribunal by the parties are not being made publicly available by OMC on a regular basis. (A true and correct copy of the Press Materials website is attached hereto as Exhibit B.)

LACK OF ACCESS TO THE FILINGS INVENTORY

7. There is currently no publicly available inventory of motions and rulings filed with this tribunal. I understand that a non-classified "filings inventory" is

maintained for the use of the parties and the tribunal, setting forth all motions and other filings before the military judge. Neither this filings inventory nor any other docket of the proceedings is made publicly available during the pendency of the commission proceedings.

8. The DOD websites for materials related to the commissions are no substitute for access to the filings inventory. Information is not posted in a timely manner and it has been several weeks since any materials were added to these websites. For example, on October 17, 2007, this court granted in part and denied in part the prosecution's motion for reconsideration, but there is still no DOD announcement or publication of this ruling.

LACK OF ACCESS TO MOTIONS AND RELATED FILINGS

9. There currently is no place for the press or public to obtain copies of motions, requests for relief, and other material filed with the tribunal. At the military commission trial level, reporters are not advised of the presence of a court clerk or chambers staff available to provide copies of filings. As a result, requests for information by reporters are made to public affairs officials for the DOD, the OMC, or the Joint Task Force ("JTF"). These officials apparently have no authority to provide copies of filed material, and I have no way of knowing if my requests for documents ever reach judges.

10. Although counsel in the case are sometimes willing to provide a copy of filed motion papers to a reporter, reporters cannot know what materials exist and could be requested because of the absence of a public docket.

11. In June 2007, for example, the military judges in both the Kahdr and Hamdan proceedings concluded that they had no jurisdiction to proceed because neither

detainee had been held to be an unlawful enemy combatant. The press and public had no advance notice that this jurisdictional issue had even been raised and no ability to review the positions taken by the parties.

12. In the weeks leading up to the November 8, 2007 session in the Khadr proceeding both I and my attorney requested access to the pending motions and court rulings without any success. On October 12, 2007, I made such a request to Lt. Catheryne Pully, public affairs officer for OMC, both orally and by email. (A true and correct copy of my email to Lt. Pully is attached hereto as Exhibit C.) Lt. Pully told me that these materials were in the control of the military judge. This is the same response my attorney was separately given. I asked Lt. Pully that my request be forwarded to the judge, but received no response. On the eve of the hearing I wrote a new request explaining that I had received no response and requesting one. (A true and correct copy of this request is attached hereto as Exhibit D.) This second request has also gone unanswered.

13. During the session in the Khadr case on November 8, 2007, the military judge, Col. Peter E. Brownback III, indicated that the record would be made available once it is authenticated, but gave no time frame for this to occur. I have been told the record will not be authenticated until after the final verdict is rendered and sentencing has occurred. If this is so, the public will have no access to motions, and other filings until long after the case is over.

14. The now-concluded prosecution of Australian David Hicks before another military commission demonstrated how the lack of effective access makes it difficult for the press or public to follow developments before military commission. On March 26,

2007, the day before his trial was to begin, Hicks agreed to a plea arrangement and entered a guilty plea. On March 30, 2007, Hicks was sentenced to a term of additional confinement in Australia and precluded from any communication with the press during his continuing confinement. Only later, after Hicks was gone from Guantanamo, was a redacted copy of the Record of Trial of the *Hicks* commission posted to the DOD website. (A copy of this Record can be viewed at [http://www.defenselink.mil/news/Mar2007/US%20v%20David%20Hicks%20ROT%20\(Redacted\).pdf](http://www.defenselink.mil/news/Mar2007/US%20v%20David%20Hicks%20ROT%20(Redacted).pdf).)

15. Moreover, it was only at this late date that the public and press were provided access to the accusations of misconduct Hicks had leveled before trial against the prosecutor in charge of his case. Until then there was no way to learn from the tribunal that on March 19, 2007 Hicks had moved to disqualify the chief prosecutor, Col. Morris D. Davis. Because I was covering the Hicks prosecution, I learned at the time that such a motion had been made, but when I requested a copy of the motion from OMC public affairs officials, I was told that the motion was “private between the judge and the lawyers.”

16. The redacted version of the *Hicks* Record of Trial contains several other requests for relief, and objections by the parties and rulings by the military judge, Col. Ralph H. Kohlmann. (A true and correct copy of the Filings Inventory in Hicks, released after the conclusion of the proceedings, is annexed as Exhibit E.) None of these documents was publicly released during the pendency of the proceedings.

PROCEDURES THAT FURTHER RESTRICT ACCESS

17. Beyond the absence of timely public access to written submissions and rulings, I understand that the parties and judges involved in the on-going military commissions communicate with one another via email correspondence that includes various applications and legal arguments by the parties and rulings by the judges. These emails are not made available to the public, except by chance. A few emails have become public only because they happened to be attached to briefs filed with the Court of Military Commission Review ("CMCR").

18. For example, on September 25, 2007 an order scheduling Khadr's arraignment and setting a timetable for the submission of evidence on the critical issue of Khadr's status as an Unlawful Enemy Combatant was issued by email, and two days later an email order was issued granting a defense motion for a continuance. (A true and correct copy of these email rulings are attached hereto as Exhibit F.) The press and public can not possibly have an informed understanding of developments in the proceedings before the military commissions without contemporaneous access to such developments in the case.

19. We know from the now released Record of Trial in *Hicks* that motions, objections and rulings were made by email in that case, too. For example, on March 20, 2007 the prosecution objected to the presence of the accused at a Rule 802 conference. On March 21, 2007, the judge resolved various scheduling rulings, and ordered that the accused not be present at the Rule 802 conference. Later that day, the defense objected to any Rule 802 conference outside the presence of the accused. (A true and correct copy of these emails is attached hereto as Exhibit G.) All of these issues were communicated and

resolved via email. None of the emails was made publicly available during the pendency of the commission proceedings.

20. The issues being raised and resolved by email are the very issues that civilian courts routinely handle through publicly filed motions. As far as I am aware, these rulings issued by email in the commissions are not reduced to a form made contemporaneously available to the public, so there is no way for a reporter to track developments in the case. Without access to such information a reporter can not fully understand the status of a proceeding, the issues being raised and the positions being taken by the parties.

SESSIONS CONDUCTED IN PRIVATE

21. Closed-door Rule 802 conferences are also apparently being used to litigate substantive issues, such as jurisdictional questions and the scope of protective orders. In many instances, it is difficult to follow what is occurring in an open session because there are so many mentions of previous closed-door discussions and previously exchanged motions, rulings and other material that are not made public.

22. In particular, it appears from the presentations in open commission sessions that arguments have previously been made during private conferences, which apparently have been used to address substantive issues broader than scheduling or other routine, administrative matters.

23. For example, during the November 8, 2007 public session arguments were made on whether there would be a hearing on the key jurisdictional issue of whether Khadr is an "unlawful" enemy combatant. It was evident from the session that the prosecution had made an earlier proffer of what evidence it might present, but few of the

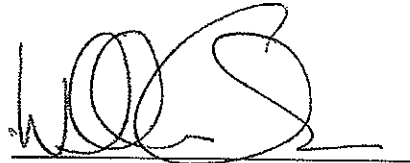
details of that proffer are known. The prosecutor was stopped from indicating the details about what evidence he was prepared to present in public session because of rulings that apparently had been made in the closed sessions. It is also known that on the eve of the November 8 hearing, in closed-door meetings, the prosecutors informed defense counsel of a witness with exculpatory information, but little has been disclosed about the nature of this information.

24. Finally, neither the transcripts of the open sessions nor written summaries of the Rule 802 conferences are publicly released in a timely fashion. It is my understanding that an oral or written summary of each Rule 802 conference is required to be entered into the record at the next commission session. Although the judge delivers oral summaries, they are not adequately detailed to allow an observer to fully understand what transpired.

25. Transcripts are important for two reasons. First, conferences are held between the judge and the attorneys by phone or email, and reporters are not present. Second, at public hearings references are often made to matters resolved in non-public sessions. Without a transcript of what transpired it is often not possible to understand the comments or references made in the public session.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: New York, New York
November 20, 2007



William Glaberson

EXHIBIT A



United States Department of Defense

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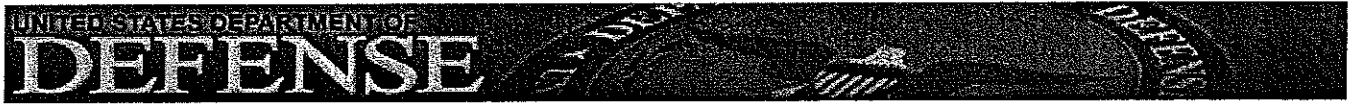
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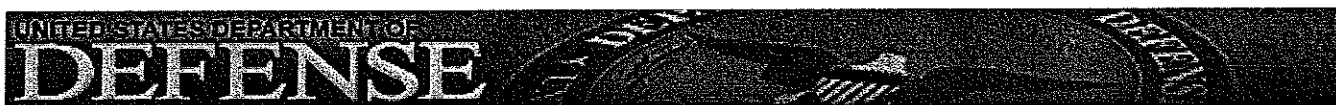
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EXHIBIT C

From: William Glaberson [REDACTED]
Sent: Friday, October 12, 2007 2:12 PM
To: [REDACTED] DoD OGC
Subject: Khadr filing request/NYTimes

[REDACTED]
DoD OMC

Dear Lt [REDACTED]

As we discussed, this is a written request for filings in the Khadr case.

As I mentioned, in an e-mail correspondence with the lawyers Judge Brownback directed the prosecution and defense in the Khadr case to file materials with the commission outlining their positions on the central jurisdictional question in the case, whether Mr. Khadr is an "alien unlawful enemy combatant."

Because these materials are effectively motions rather than private correspondence, I am requesting that they be released publicly. If necessary, please consider this a request under the Freedom of Information Law and/or Pentagon policies regarding the transparency of the commission process.

As representatives of The New York Times have expressed to your office on several occasions previously, we continue to request that motions, orders and decisions of the commissions and the commission appeals court be made public on a timely basis.

Thank you for your consideration of this issue.

Bill Glaberson
[REDACTED]

EXHIBIT D

Date: Wed, 07 Nov 2007 15:43:55 -0500

To: [REDACTED]

From: William Glaberson <[REDACTED]>

Subject: motions/filings NYT request

To OMC Public Affairs:

Re: Khadr case

As you may recall, I made a request some time ago for access to pretrial motions and filings including e-mail correspondence between the parties and the judge that are effectively motions and legal decisions affecting the scope of the proceedings tomorrow. I have not received any response and note that there have been no documents filed publicly on the OSD web site concerning this case for many weeks.

Can you fill me in on the progress on this issue? What is the authority for keeping all documents from being posted publicly? As you know in civilian courts it is routine for filings to be part of the public record.

Thanks, Bill Glaberson

EXHIBIT E

Filings Inventory – US v. Hicks (Version 2)

As of 2100 hours, 30 March 2007

This Filings Inventory includes only those matters filed since 1 March 2007.

Dates in red indicate due dates

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes OR = First (original) filing in series Letter indicates filings submitted after initial filing in the series. R=Reference	AE
P 001: Special Request for Relief to permit the absence of	14 Mar 07			<ul style="list-style-type: none"> request filed granted by MJ 14 Mar 07 	OR - 009
P 002:					A - 009

Defense (D Designations)

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes OR = First (original) filing in series L etter indicates filings submitted after initial filing in the series. Ref=Reference	AE
D 001: Motion for Appropriate Relief - Prosecutorial Misconduct	19 Mar 07	26 Mar 07		<ul style="list-style-type: none"> • motion filed • A. Pros response 26 Mar 07 (at GTMO) 	OR - 015
D 002: Special Request for Relief to permit telephonic testimony for Motion D001	20 Mar 07			<ul style="list-style-type: none"> • request filed • 	OR - 017
				<ul style="list-style-type: none"> • 	
				<ul style="list-style-type: none"> • 	
				<ul style="list-style-type: none"> • 	
				<ul style="list-style-type: none"> • 	
				<ul style="list-style-type: none"> • 	

MJ Designations

Designation Name (MJ)	Status /Disposition/Notes OR = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
MJ 001: Detail of Military Judge, and Scheduling of First Session	<ul style="list-style-type: none"> • sent to all parties 6 Mar 07 w/arraignment date of 20 Mar • A. DC request continuance on 8 Mar to 27 Mar • B. Pros request on 9 Mar for 26 Mar date • C. MJ ruling on 9 Mar - arraignment on 26 Mar 	OR - 003 A - 005 B - 005 C - 005
MJ 002: Preliminary Procedural Instructions	<ul style="list-style-type: none"> • sent to all parties 9 Mar 07 	007
MJ 003 – Voir Dire	<ul style="list-style-type: none"> • MJ bio sent 6 Mar 07 • A. voir dire submitted by defense • B. voir dire submitted by prosecution • C. MJ responses to voir dire submitted by prosecution and defense 	OR -006 A - 010 B - 012 C - 013
MJ 004: Notice of RMC 802 Hearing	<ul style="list-style-type: none"> • sent to all parties 20 Mar 07 w/hearing date of 25 Mar (follow-on email included) 	016
	•	

PROTECTIVE ORDERS

[illegible]

Inactive Section

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes OR = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE

Defense (D Designations)

[illegible]

Inactive Section

MJ Designations

Designation Name (PO)	Status /Disposition/Notes OR = First (original) filing in series Letter indicates filings submitted after initial filing in the series, Ref=Reference	AE

EXHIBIT F

-----Original Message-----

From: [REDACTED]

To: [REDACTED]

Sent: Tue Sep 25 16:11:31 2007

Subject: FW: Initial Notice - US v. Khadr Trial Proceedings Following CMCR Ruling

COL Brownback has directed that I send the email below to the parties.

v/r,

LTC [REDACTED] USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[REDACTED]

FAX: [REDACTED]

From: Pete Brownback [REDACTED]

Sent: Tuesday, September 25, 2007 15:56

To: [REDACTED] LTC, DoD OGC

Cc: [REDACTED]

Subject: Initial Notice - US v. Khadr Trial Proceedings Following CMCR Ruling

LTC [REDACTED]

Please forward the email below to the parties in US v. Khadr. Please furnish a copy of it to other interested personnel.

COL Brownback

Exhibit A

Counsel in the case of United States v. Khadr,

1. Chronology:

- a. 4 June 2007 - Dismissal of charges - see AE 15.
- b. 8 June 2007 - Government request for reconsideration - see AE 17.
- c. 29 June 2007 - Disposition of request for reconsideration - see AE 23.
- d. 3 July 2007 - Government notice of appeal - see AE 25.
- e. 24 September 2007 - Court of Military Commission Review opinion - see AE 26.
- f.. 24 September 2007 - MJ notified of CMCR opinion - see AE 27.
- g. 25 September 2007 - Notification of CMCR opinion served on accused - see AE 28.

2. Under the provisions of RMC 707b(4)(B), the RMC 707 30-day and 120-day clocks start on 25 September 2007, the date of service of the opinion on the accused.

3. If either party disagrees with the legal conclusion stated in paragraph 2 above, that party shall file a motion for appropriate relief NLT one week from the date of this email. The opposing party may respond within one day of receipt of the motion. However, if the opposing party agrees that the legal conclusion is incorrect, the opposing party may join in the motion or present a separate motion.

4. The accused will be arraigned at 1100 hours, 11 October 2007, in the courtroom at GTMO, Cuba. Counsel may request a delay in the arraignment within 48 hours of the date/time of this email.

5. At the 4 June 2007 session, defense counsel agreed that he would prepare a brief concerning how the Foreign Attorney Consultants could be integrated into the trial without violating the provisions of the MCA (See ROT, p. 6.). This brief shall be provided to the government and the military judge by 1600 hours, 1 October 2007. The government will have until 1600 hours, 4 October 2007 to respond.

6. Counsel will be prepared to establish the motions and trial schedule after arraignment. Counsel will provide the commission and the opposing party a proposed motion and trial schedule NLT 1600 hours, 2 October 2007.

7. A modified trial script will be provided to counsel.

8. NLT 1600 hours, 2 October 2007, the government will provide the commission and the defense the materials upon which it intends to rely to establish that the accused is an Unlawful Enemy Combatant (UEC). Matters previously provided to the commission (e.g., AE 011, AE 013, AE 014, AE 021) are already in the record and may be referenced by either party. By the same date/time, the defense will provide the commission and the government

Exhibit A

any materials upon which it intends to rely to refute a designation as an UEC.

9 . The parties are advised that matters presented, both factual and legal, concerning the issue of designation as an UEC, must be focused specifically on whether or not the accused meets the definition of UEC as established by the MCA (10 USC 948a(1)). This threshold or initial determination is solely for the commission to decide whether or not there is MCA-jurisdiction over the accused. Other matters which might affect jurisdiction (i.e., international law, constitutional law, criminal law) will not be heard in conjunction with this threshold or initial determination of jurisdiction.

Peter E. Brownback III

COL, JA, USA

Military Judge

-----Original Message-----

From: [REDACTED]

To: [REDACTED]

Sent: Thu Sep 27 18:15:58 2007

Subject: FW: Ruling - Defense Motion to Vacate or Request a Continuance - United States v. Khadr

COL Brownback has directed that I send the email below to the parties.

v/r,

LTC [REDACTED] SAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[REDACTED]

FAX: [REDACTED]

From: Pete Brownback [REDACTED]

Sent: Thursday, September 27, 2007 17:31

To: Chappell, Danny, LTC, DoD OGC

Cc: [REDACTED]

Subject: Ruling - Defense Motion to Vacate or Request a Continuance - United States v. Khadr

LTC [REDACTED]

Please forward the email below to the parties in the case of United States v. Khadr.

Please distribute it to other interested persons.

COL Brownback

Exhibit B

Counsel in the case of United States v. Khadr,

1. The Commission has considered the Defense Motion to Vacate, or, Alternatively, to Request a Continuance filed at 2308 hours, 25 September 2007. The Commission has also considered the defense supplement filed at 1015 hours, 27 September 2007. The Commission has also considered the government response of 1608 hours, 27 September 2007.

2. Under RMC 707, the accused must be arraigned within 30 days of the service of charges. The Commission has a duty to meet this requirement, unless the interests of justice require a delay. In the instant case, RMC 707b(4)(B) provides that the start of the 30 day period is 25 September 2007, the date on which the accused was served a copy of the opinion of the Court of Military Commission Review (CMCR). Under RMC 707 (b)(1), day 1 of the 30-day period is 26 September 2007.

3. In its motion, the defense discusses the possibility of filing a motion for reconsideration with the CMCR or filing an appeal of the CMCR decision with the U.S. Court of Appeals for the District of Columbia Circuit. At this time, however, it has done neither. The 24 September 2007 ruling of the CMCR must currently be treated as a final ruling by that court.

4. The matters presented by the defense in the 2308 hours, 25 September 2007 motion did not rise to the level required to grant a delay. The only grounds for a continuance contained in the motion were the possibilities of filing a motion or an appeal with another court.

5. In the 1015 hours, 27 September 2007 supplement, the defense did present matters which materially affect the ability of the defense to appear in Guantanamo Bay, Cuba on 11 October 2007 and represent Mr. Khadr in a competent manner. [In connection with the supplement, the Commission refers defense counsel to the ROC 2.f requirement to use numbered paragraphs in all emails.]

a. In making its ruling on the defense request, the Commission is giving no weight to the supplement paragraph starting "With respect to the legal component, the defense...." The Commission will determine the scope of the proceeding following the arraignment. Any limitation will not affect the ability of the defense to present matters in conjunction with an ordered motion schedule.

b. In making its ruling on the defense request, the Commission is giving no weight to the last sentence of the paragraph starting "In short, the defense is not prepared...."

6. The government response did not address the matters contained in the defense supplement which materially affect the ability of the defense to appear in Guantanamo Bay, Cuba on 11 October 2007 and represent Mr. Khadr in a competent manner. Instead, the government focused on the existence or non-existence of a right to appeal the ruling by the CMCR (See paragraph 4A) and the question as to which court has the authority to stay proceedings pending an appeal (See paragraph 4B).

7. Having considered the matters above and the provisions of RMC 707, I find:

a. The requested delay (from 11 October 2007 to the week of 5 November 2007) is for a period of 25-29 days.

b. There have been no previous requests for delay from the current defense team in this proceeding (But see AE 006).

c. On its face, as established by the matters contained in the supplement rather than the original motion, the request is reasonable.

d. The matters set forth by the government in its response do not address the matters contained in the supplement.

e. The prosecution sets forth no specific harm which would result to its case or to the public

Exhibit B

interest from the requested delay.

f. The public interest in a speedy trial will not be harmed by a delay in the arraignment in this case.

g. With regard to the provisions of RMC 707(b)(4)(E)(ii)(A), I specifically find that the interests of justice are served by granting a continuance and those interests outweigh the best interests of the public and the accused in a prompt trial.

h. I specifically do not find that arraignment within 40 days of service of the opinion of the Court of Military Commissions Review on the accused is not prompt.

i. With regard to the provisions of RMC 707(b)(4)(E)(ii)(B), the defense is the party responsible for the delay occasioned by this continuance.

8. The defense request for a continuance is granted insofar as it extends until 1100 hours, 8 November 2007.

9. The government will insure that all materials previously provided to LtCol Vokey are provided to LCDR Kuebler as soon as possible.

10. The government will draft and forward to the defense and the military judge a proposed protective order. The order will be fair to both sides.

Peter E. Brownback III

COL, JA, USA

Military Judge

EXHIBIT G

DoD OGC

From: Mori, Michael, MAJ, DoD OGC
Sent: Wednesday, March 21, 2007 6:53 PM
To:

Cc:

Subject: RE: HICKS RESPONSE TO MJ EMAIL OF R.M.C. 802 Conference and Initial Session Trial Guide: U.S. v Hicks

Sir,

1. The defense objects to any 802 conference where Mr. Hicks is prohibited from being present. R.M.C. 802(d) provides that the accused's presence at an 802 conference is not prohibited. The defense objects to the SJA's decision and the Military Judge's apparent ruling that Mr. Hicks will not be present at the 802 conference. This prohibits Mr. Hicks' appearance at an 802 conference in violation of R.M.C. 802(d).
2. Prohibiting Mr. Hicks from attending 802 conferences deprives him of the right to be present for his commission as guaranteed by the MCA and to materially participate in his defense. See 10 U.S.C. § 949a(b)(1)(B) ("The accused shall be present at all sessions of the military commission (other than those for deliberations or voting), except when excluded under section 949d of this title.").
3. The defense also objects to the 802 on the basis that it has been scheduled when lead counsel for Mr. Hicks cannot attend.
4. Maj Mori and Ms. Snyder will attend the conference. Please be advised that we will not be in a position to speak. See R.M.C. 802, Discussion ("Normally, the defense counsel may be presumed to speak for the accused".).
5. Finally, please be advised the defense intends to tape record the conference.

v/r
Maj Mori

Major Michael D. Mori
United States Marine Corps
Defense Counsel
Office of the Chief Defense Counsel, Office of the Military Commissions

CONFIDENTIALITY NOTICE. The information contained in this e-mail and any accompanying attachments may constitute confidential, attorney-client information and work product which is legally privileged. This information is the property of the individual attorney and respective client. If you are not the intended recipient of this information, any disclosure, copying, distribution or the taking of any action in reliance on this information is strictly prohibited. If you received this e-mail in error, please notify us immediately by return e-mail or by calling the above-numbers.

-----Original Message-----

From: LTC, DoD OGC
Sent: Wednesday, March 21, 2007 17:58
To:

Subject: FW: HICKS RESPONSE TO MJ EMAIL OF R.M.C. 802 Conference and Initial Session Trial Guide: U.S. v Hicks

has directed that I send the email below to the parties.

v/r,

USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

-----Original Message-----

From:
Sent: Wednesday, March 21, 2007 14:22
To: DoD OGC
Subject: FW: HICKS RESPONSE TO MJ EMAIL OF R.C.M 802 Conference and Initial Session Trial Guide: U.S. v Hicks

Please forward this message to the counsel in subject case.

Counsel:

1. The R.M.C. 802 conference will go @ 1400 on 25 March 2007 as previously ordered. The time was not chosen at random and I am not seeking to frustrate anyone. The conference is intended to enable me to ensure that the arraignment hearing is conducted in as efficient and professional a fashion as possible. The requested change in the meeting time does not further my intentions in that regard.

2. I previously asked that counsel from both sides work together to develop a recommended litigation schedule that works as well as possible for both sides. Hopefully you have been doing this, and hopefully the defense has already taken Mr. Dratel's concerns into account. In any event, I expect that Maj Mori will be able to provide scheduling input from the defense side at the 802 conference.

3. No disputed matters will be resolved at the 802 conference.

4. With regard to Mr. Dratel, I would also note that this court has not yet received his notice of appearance and agreement as required by the preliminary procedural instructions. A signed copy of enclosure 4 to the preliminary procedural instructions must be submitted to the court prior to his participation in this case.

5. Mr. Hicks will not be present at the 802 conference on 25 March 2007.

6. Arrangements with regard to any visit with or movement of Mr. Hicks should be coordinated with appropriate personnel on the JTF-GTMO staff.

V/R,

Colonel, U.S. Marine Corps

-----Original Message-----

From: LtCol, DoD OGC
Sent: Tuesday, March 20, 2007 16:35
To:

Subject: RE: HICKS RESPONSE TO MJ EMAIL OF R.C.M 802 Conference and Initial Session Trial Guide: U.S. v Hicks

-- sir:

1. Per my phoncon today o/a 1530 with the SJA, JTF-GTMO (CAPT , copied in this e-mail chain), the Prosecution objects to the presence of the accused at the 802 conference -- to include the accused being moved to any location other than to the courtroom for a session on the record.
2. For security and related logistical reasons, JTF-GTMO is prepared to move the accused only for purposes of the military commission session on the record and in the courtroom.
3. Defense will be provided adequate access to consult with their client throughout the day, to include after 1800 upon good cause being shown (e.g., to discuss the results of the 802 conference).

V/r-- LtCol

. LtCol, USMC
Prosecutor, Office of Military Commissions

-----Original Message-----

From: Mori, Michael, MAJ, DoD OGC
Sent: Tuesday, March 20, 2007 15:19
To:

Subject: HICKS RESPONSE TO MJ EMAIL OF R.C.M 802 Conference and Initial Session Trial Guide: U.S. v Hicks

Sir,

Mr. Dratel is not due to arrive until approx. 1630. As Mr. Dratel is lead counsel for Mr. Hicks, it is requested that the RMC 802 conference be scheduled after 1800. This will provide sufficient time for Mr. Dratel to get over from Leeward.

Ms. Snyder and I can work on getting the AEs formalized outside of an 802 conference but any discussion on the listed items will require Mr. Dratel's presence.

Additionally, pursuant to RMC 802(d), the defense would request that Mr. Hicks be made available at the Commission building at 0900 until the conclusion of any 802 conference on 25 March.

Mr. Hicks' presence will permit him to participate in the 802 conference, should he choose to as well as permit counsel to consult with Mr. Hicks in a timely manner. Additionally, Mr. Hicks' presence at the commission building will permit adequate time for preparation between Mr. Hicks and his counsel for the arraignment session scheduled on the 26th while facilitating counsel availability for the scheduled 802 conference or any subsequent conference that day.

v/r
Maj Mori

Major Michael D. Mori
United States Marine Corps
Defense Counsel
Office of the Chief Defense Counsel, Office of the Military Commissions
[REDACTED]

CONFIDENTIALITY NOTICE. The information contained in this e-mail and any accompanying attachments may constitute confidential, attorney-client information and work product which is legally privileged. This information is the property of the individual attorney and respective client. If you are not the intended recipient of this information, any disclosure, copying, distribution or the taking of any action in reliance on this information is strictly prohibited. If you received this e-mail in error, please notify us immediately by return e-mail or by calling the above-numbers.

-----Original Message-----

From: LTC, DoD OGC
Sent: Tuesday, March 20, 2007 15:00
To:

Subject: FW: R.C.M 802 Conference and Initial Session Trial Guide: U.S. v Hicks
has directed that I send the email below to the parties.

v/r,

, USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

-----Original Message-----

From:
Sent: Tuesday, March 20, 2007 12:11
To: LTC, DoD OGC
Subject: R.C.M 802 Conference and Initial Session Trial Guide: U.S. v Hicks

Please send this message and the initial session trial guide to the counsel in subject case.

Counsel,

1. Attached is the trial guide we will use for the arraignment session. Please note the items referred to therein that you should be providing to for marking as AEs.

2. I am hereby directing a R.M.C. 802 conference re this case to be held in the conference room next to the GTMO court room @ 1400 on 25 March 2007. All counsel assigned to this case are directed to attend. (has been pr eviously excused from the arraignment session by me. I also understand that Mr. Dratel's travel schedule may not be able to facilitate his attendance.)

3. At this 802 session we will:

- a. Ensure we have all items to be referenced in court marked as AEs.
- b. Provide me an opportunity to receive input from both sides on the litigation schedule.
- c. Have a preliminary discussion re Ms. Snyder's status as a civilian counsel in this case vis a vis the provisions of the M.C.A. and the M.M.C.

V/R,

Colonel, U.S. Marine Corps

ATTACHMENT B

public access to open sessions of military commission proceedings.” Mr. Chapman further stated that in order to avoid invading the authority “of the military judge after the Convening Authority has referred a case to trial,” it is within the power of the judge to direct or prevent the release of any filings:

Because motions are filed with the military judge, rather than with the Convening Authority, it is within the broad discretion of each military judge to direct motions practice and to provide for or restrict release of any particular document filed or submitted in the case. The Office of Military Commissions Public Affairs Officer, Major Beth Kubala, will effect release of commission documents consistent with the rulings and orders of each military judge.

Mr. Chapman went on to state that “[o]nce the trial is completed and the record authenticated by the military judge, the record of trial will be sent to the Convening Authority.” (A true and correct copy of Mr. Chapman’s letter is attached hereto as Exhibit B.)

5. On September 14, 2007, on behalf of The New York Times and The Associated Press, I wrote to the Clerk of the Court for Military Commissions, Dorrance Smith, Assistant Secretary of Defense, Public Affairs, and LTC Mike Chappell, Senior Attorney Advisor, Military Commissions Trial Judiciary. I requested access to the dockets of proceedings before the Military Commissions and copies of any motions, answering papers, and orders in those proceedings. (A true and correct copy of my September 14, 2007 letter is attached hereto as Exhibit C.)

6. On September 24, 2007, Dorrance Smith replied to state that my letter had been forwarded to the Office of General Counsel for the Department of Defense. (A true and correct copy of Mr. Smith’s letter is attached hereto as Exhibit D.)

7. On October 17, 2007, on behalf of The New York Times and The Associated Press, I wrote to William J. Haynes II, General Counsel, Department of Defense, stating that recent activity in the Military Commissions underscored “the urgency of the request by the Times and AP for effective access to the docket of proceedings before the Military Commissions as well as the motion papers and orders entered in the proceedings.” (A true and correct copy of my October 17, 2007 letter is attached hereto as Exhibit E.) To date, we have received no response from Mr. Haynes.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: New York, NY
November 20, 2007

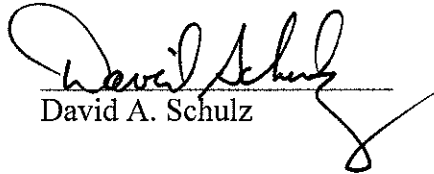

David A. Schulz

EXHIBIT A



David McCraw
Vice President and
Assistant General Counsel

May 3, 2007

229 West 43rd Street
New York, NY 10036

tel 212.556-4031
fax 212.556-4634

Maj. N [REDACTED]
Deputy Legal Adviser
Office of Military Commissions
Department of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Re: Press Access to Judicial Documents

Dear [REDACTED]

I write on behalf of The New York Times to seek clarification of the procedures that will be employed by the Convening Authority and Military Commissions in handling requests from press representatives for copies of nonclassified motions and similar papers filed as part of Commission proceedings. While we understand that certain materials will be deemed classified for reasons of national security, our present concern is not with such items but instead with press access to motions and other filings that do not raise any national security issues but are not made available to the press.

This issue arose in March during the prosecution of David Hicks. Defense lawyers for Mr. Hicks made a motion to disqualify the chief prosecutor in the case, Col. Morris D. Davis. The motion was not premised on any classified evidence or information but instead was addressed to Col. Davis's public comments about one of Mr. Hicks's defense lawyers. New York Times reporter William Glaberson, who was present at Guantanamo to cover the Hicks trial, requested a copy of the defense motion through the Commission's Public Affairs staff. He was informed that the motions would not be made public.

We believe that such secrecy is inconsistent with the fair trial and due process guarantees implemented by the Military Commissions Act of 2006 and contrary to the law of access that has developed as a matter of federal common law and the First Amendment and been applied to court-martials, judicial prosecutions of terrorism suspects, and a range of other adjudicatory proceedings. Reporters were present in the courtroom to cover the Hicks proceedings, and there would appear to be no basis in law or in logic to deny them access to a motion that was filed in those proceedings and

raised only issues of law and facts unrelated to any evidence in the case. We believe that the standards used in other adjudicatory bodies apply here as well: specifically, that the party seeking to seal nonclassified filings should have to demonstrate on the record that there is a compelling interest to be served by confidentiality, that no alternative to sealing is available, and that the sealing is as narrow as possible.

We are not seeking by this letter access to the Hicks motion papers. Instead, we are asking that the Convening Authority do two things: first, clarify the standards by which the Commissions may declare all or parts of nonclassified motions or similar filings to be confidential and, second, set forth a procedure by which news organizations can challenge before the Convening Authority any decision by a Commission to seal nonclassified legal filings. It seems inevitable that this issue of access will recur as the Commissions go forward. We believe that both the Commissions and the press would be well served by having a simple and expedited procedure under which a news organization could be heard through a letter brief submitted to the Convening Authority setting forth its argument for access to any nonclassified materials that have been sealed.

Such an expedited procedure, leading to a timely decision on access, would appropriately safeguard the public's interest in monitoring Commission proceedings and assure that sealing decisions are being made in accordance with established law and policy. It is particularly important to the press and to the public that decisions about access be made at the time of the proceedings. While we know that the Convening Authority has posted papers from these proceedings on a public website, that material is not current. The public's ability to monitor the work of a Commission in a particular case depends on having access to relevant information at the time of the proceeding, not merely access to the historical record at some later date.

Thank you for your attention to this issue. I look forward to your response and would welcome the opportunity to discuss the issues further with you and others on your staff.

Sincerely,

David E. McCraw

EXHIBIT B



OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

CONVENING AUTHORITY

June 15, 2007

Mr. David McCraw
Vice President and General Counsel
The New York Times Company
229 West 43d Street
New York, New York 10036

Dear Mr. McCraw,

Thank you for your inquiry and for the efforts of your publication to make the military commissions process as transparent as possible for your readership.

The Military Commissions Act, the Rules for Military Commissions, and the Regulation for Trial by Military Commissions clearly contemplate public access to open sessions of military commission proceedings. The Office of Military Commissions has made, and will continue to make, every effort to support access by members of the press to commission proceedings consistent with the Act, the Rules, and the Regulation.

As is normally the practice in military trials, once charges have been referred to trial by the Convening Authority, control of the proceedings vests in the military judge detailed to the case by the Chief Trial Judge. To protect the integrity of the proceedings, the Convening Authority will avoid any action that could be viewed as usurping the authority, or invading the province, of the military judge after the Convening Authority has referred a case to trial. Because motions are filed with the military judge, rather than with the Convening Authority, it is within the broad discretion of each military judge to direct motions practice and to provide for or restrict release of any particular document filed or submitted in the case.]

The Office of Military Commissions Public Affairs Officer, Major Beth Kubala, will effect release of commission documents consistent with the rulings and orders of each military judge.

Once the trial is completed and the record authenticated by the military judge, the record of trial will be sent to the Convening Authority. At that time, any portion of the record that has not been sealed by the military judge will be made public, including all previously undisclosed motions, exhibits, and allied papers, after redaction in accordance with the Freedom of Information Act.

Sincerely,

Deputy Legal Advisor
Office of Military Commissions

Printed on  Recycled Paper

EXHIBIT C

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

321 WEST 44TH STREET, SUITE 510
NEW YORK, NEW YORK 10036

(212) 850-6100

FACSIMILE (212) 850-6299

JEANETTE MELENDEZ BEAD*

SETH D. BERLIN

JAMES E. GROSSBERG*

ASHLEY I. KISSINGER*

ELIZABETH C. KOCH*

LEE LEVINE*

ROBERT PENCHINA

CELESTE PHILLIPS*

DAVID A. SCHULZ

NATHAN SIEGEL

GAYLE C. SPROUL

MICHAEL D. SULLIVAN*

1050 17TH STREET, N.W., SUITE 800, WASHINGTON, D.C. 20036-5514

(202) 508-1100 FACSIMILE (202) 861-9888

2112 WALNUT STREET, THIRD FLOOR, PHILADELPHIA, PA 19103

(215) 988-9778 FACSIMILE (215) 988-9750

WRITER'S DIRECT DIAL

(212) 850-6103

NICOLE A. AUERBACH

MICHAEL BERRY*

CHAD R. BOWMAN*

THOMAS CURLEY*

AMANDA M. LEITH*

JOHN B. O'KEEFE*

ADAM J. RAPPAPORT*

ALIA L. SMITH

*NOT ADMITTED IN NEW YORK

September 14, 2007

VIA OVERNIGHT MAIL

Clerk of the Court

Office of Military Commissions

Office of Convening Authority

1600 Defense Pentagon

Washington, DC 20301

Dorrance Smith

Assistant Secretary of Defense for Public Affairs

Department of Defense

1400 Defense Pentagon

Room 2E565

Washington, DC 20301

LTC [REDACTED], JA, USAR

Department of Defense

Office of General Counsel

Senior Attorney Advisor

Military Commissions Trial Judiciary

1600 Defense Pentagon

Washington, DC 20301

Re: Public Access to Military Commission Records

Dear Clerk, Ms. Smith and [REDACTED]

I write on behalf of The New York Times and the Associated Press to request access to (a) the dockets of proceedings before the Military Commissions at Guantanamo Bay and (b) copies of any motions, answering papers and orders in these proceedings. It is my understanding that a website is maintained that is accessible by all parties and contains this material in the form of a "filings inventory." As set forth below, the public and press have both a statutory and a

Assistant Secretary of Defense for Public Affairs
Attorney Advisor
September 14, 2007
Page 2

constitutional right of access to the proceedings of the Military Commissions, and this right extends to the docket of the proceedings as well as the motion papers and orders in the proceedings the disclosure of which does not raise national security or personal safety issues.

Statutory Access Rights

The public's right of access to Military Commissions is mandated by the Military Commissions Act of 2006, 10 U.S.C. § 948a, *et seq.* (the "MCA"), and recognized in both the Manual for Military Commissions ("MMC") and Regulation for Trial by Military Commissions ("RMC") issued by the Department of Defense. The MCA expresses Congress' clear intent that the public know and observe the conduct of Commissions. Proceedings may be closed only where the presiding judge makes specific findings that closure is "necessary" to protect national security information or to ensure the physical safety of individuals. 10 U.S.C. §949d(d)(2). This right of access extends not just to trials, but expressly encompasses all "proceedings," 10 U.S.C. § 949d(d)(1), which necessarily extends to oral argument and hearings as well as to the motion papers and written submissions.

The Manual and Regulations for Military Commissions both elaborate on the nature of the statutory right, confirming that the work of the Commissions is to be public except in those narrow circumstances where confidentiality is explicitly authorized. *See* MMC Rule 806(a) ("military commissions shall be publicly held"); RMC § 19-7(a) (sessions of commissions "shall be public to the maximum extent practicable"). The public access right extends specifically to all information "that has become part of the record of proceedings of military commissions in open session," and the "scheduling or result of any stage in the judicial process." RMC § 19-4(a)(3)-(4). Again, the right of access may be limited only where closure is "supported by essential findings of fact." MMC Rule 806(b). These provisions collectively afford the public a right of access to the docket detailing the motions and orders filed with a Commission together with the underlying records themselves, unless a specific determination is made that information must be withheld for national security or personal safety reasons.

First Amendment Access Right

Such a construction of the statutory and administrative provisions is necessary to avoid transgressing the public's First Amendment right of access to government proceedings. The Supreme Court has recognized the existence of a qualified, enforceable constitutional right of public access to certain government proceedings. *E.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986). The Supreme Court's precedent deals with access to various criminal proceedings, but the constitutional right has been held to extend to non-judicial branch proceedings generally. *See, e.g., Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (constitutional right of access extends to INS deportation

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

Assistant Secretary of Defense for Public Affairs
Attorney Advisor
September 14, 2007
Page 3

hearings conducted by the Department of Justice); *Baltimore Sun Co. v. Astri Inv. Mgmt. & Secs. Corp.*, 88 B.R. 730 (Bankr. D. Md. 1988) (constitutional right of access extends to creditors committee meeting in a bankruptcy proceeding). And, the constitutional right specifically extends to military proceedings conducted in the nature of criminal trials. *E.g.*, *United States v. Hershey*, 20 M.J. 433 (C.M.A. 1985) (finding First Amendment right of public access to a court martial proceeding).

So also here, the constitutional right of access extends to proceedings of the Military Commissions, and necessarily encompasses the dockets of proceedings before a Commission, motions papers filed with a Commissions, and orders entered in the proceeding. As the United States Court of Appeals for the Second Circuit has explained, the constitutional right of access extends to the written motions and documents relating to any proceedings that are themselves subject to the constitutional right of access. *In re New York Times Co.*, 828 F.2d 110 (2d Cir. 1987). The constitutional right has thus been held to apply to motion papers and documents filed in connection with an open proceeding. *E.g.*, *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252-253 (4th Cir. 1988); *In re Providence Journal Co.*, 293 F.3d 1, 10-13 (1st Cir. 2002); *Grove Fresh Disribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994). The constitutional right has been held specifically to apply to orders entered in connection with open proceedings. *E.g.*, *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 663-64 (3d Cir. 1991); *In re Continental Illinois Secs. Litig.*, 732 F.2d 1302, 1308-09 (7th Cir. 1984). And, the constitutional right has been held to apply to dockets of open proceedings. *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93-94 (2d Cir. 2004); *United States v. Valenti*, 987 F.2d 708, 715 (11th Cir. 1993). Indeed, the ability to attend open proceedings is "merely theoretical" if information provided in the docket, and motion papers is not accessible to the public. *Hartford Courant*, 380 F.3d at 93.

While the constitutional right is qualified, not absolute, it can only be defeated by findings made on the record that sealing of certain items is "essential" to serve some "transcendent" value. *See Richmond Newspapers*, 448 U.S. at 580-81.

Request for Access

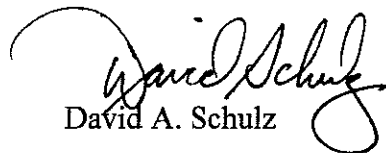
Given the statutory mandate and constitutional imperative that the Military Commissions be open to public scrutiny to the greatest extent possible, The Times and AP request access to the electronic website that contains all filings and orders relating to the Military Commissions, or to such other websites or files that will afford contemporaneous access to the docket, motions and orders relating to all Military Commissions, except where proper findings have been made that specific information must be withheld to protect national security or personal safety.

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

Assistant Secretary of Defense for Public Affairs
Attorney Advisor
September 14, 2007
Page 4

Thank you for your attention to this request. I look forward to your response and would welcome the opportunity to discuss with you the methods by which the access we are seeking may be provided.

Very truly yours,


David A. Schulz

cc: David E. McCraw
David H. Tomlin

EXHIBIT D



ASSISTANT SECRETARY OF DEFENSE
1400 DEFENSE PENTAGON
WASHINGTON, DC 20301-1400

September 24, 2007

PUBLIC AFFAIRS

Mr. David A. Schulz
Levine, Sullivan, Koch & Schulz, L.L.P
321 West 44th Street, Suite 510
New York, NY 10036

Dear Mr. Schulz:

I have received your letter dated September 14, 2007 regarding public access to military commission records.

I forwarded your letter to the Office of General Counsel for the Department of Defense so that they may follow-up appropriately.

Regards,

A handwritten signature in black ink, appearing to read "Dorrance Smith", is written over the typed name.

Dorrance Smith

EXHIBIT E

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

WASHINGTON, D.C.

NEW YORK

PHILADELPHIA

DENVER

321 WEST 44TH STREET
SUITE 510
NEW YORK, NY 10036
(212) 850-6100 PHONE
(212) 850-6199 FAX
www.lskslaw.com

WRITER'S DIRECT DIAL
(212) 850-6103
dschulz@lskslaw.com

October 17, 2007

VIA FEDERAL EXPRESS

William J. Haynes II
General Counsel
Office of General Counsel
Department of Defense
1600 Defense Pentagon
Washington, DC 20301-1600

Re: Public Access to Military Commission Records

Dear Mr. Haynes:

I am writing on behalf of The New York Times and The Associated Press to follow up on my letter of September 14, 2007 (attached hereto) that I understand has been forwarded to you for a response. There have been several indications that activity by the Military Commissions is continuing and that one or more trials may be getting underway in earnest in the near future. For example, news reports suggest that charges against several detainees, possibly including Khalid Sheikh Mohammed, will soon be referred for trial and that Brig. Gen. Thomas W. Hartmann, the Legal Advisor to the Convening Authority in the Department of Defense Office of Military Commissions, is pushing for "quicker indictments" of the detainees. It has been reported that military prosecutors intend to file charges against as many as 80 detainees.

These developments underscore the urgency of the request by the Times and AP for effective access to the docket of proceedings before the Military Commissions as well as the motion papers and orders entered in the proceedings. Please let me know if there is any further information we can provide that might facilitate your prompt consideration of the request for access.

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

William J. Haynes II
October 17, 2007
Page 2

Thank you for your attention to this request. I look forward to your response.

Very truly yours,


David A. Schulz

Enclosure

cc: David E. McCraw
David H. Tomlin

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

321 WEST 44TH STREET, SUITE 510
NEW YORK, NEW YORK 10036

(212) 850-6100
FACSIMILE (212) 850-6299

JEANETTE MELENDEZ BEAD*
SETH D. BERLIN
JAMES E. GROSSBERG*
ASHLEY I. KISSINGER*
ELIZABETH C. KOCH*
LEE LEVINE*
ROBERT PENCHINA
CELESTE PHILLIPS*
DAVID A. SCHULZ
NATHAN SIEGEL
GAYLE C. SPROUL
MICHAEL D. SULLIVAN*

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*NOT ADMITTED IN NEW YORK

September 14, 2007

VIA OVERNIGHT MAIL

Clerk of the Court
Office of Military Commissions
Office of Convening Authority
1600 Defense Pentagon
Washington, DC 20301

Dorrance Smith
Assistant Secretary of Defense for Public Affairs
Department of Defense
1400 Defense Pentagon
Room 2E565
Washington, DC 20301

LTC [REDACTED] JA, USAR
Department of Defense
Office of General Counsel
Senior Attorney Advisor
Military Commissions Trial Judiciary
1600 Defense Pentagon
Washington, DC 20301

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Assistant Secretary of Defense for Public Affairs
Attorney Advisor
September 14, 2007
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LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

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Page 3

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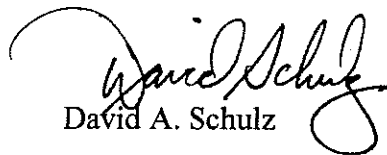
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LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

Assistant Secretary of Defense for Public Affairs
Attorney Advisor
September 14, 2007
Page 4

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Very truly yours,


David A. Schulz

cc: David E. McCraw
David H. Tomlin

[REDACTED]

From: Berrigan, Michael, Mr, DoD OGC
Sent: Wednesday, November 21, 2007 3:49 PM
To: [REDACTED], LTC, DoD OGC; [REDACTED] Ms, DoD OGC
Cc: [REDACTED]'; 'Charles Swift'; 'Schneider, Harry (Perkins Coie)'; 'McMillan, Joseph M. (Perkins Coie)'; Lindee, Kimberlee, LN1, DoD OGC; David, Steven, COL, DoD OGC; [REDACTED] OGC; Morris, Lawrence, COL, DoD OGC; Prasow, Andrea, Ms, DoD OGC; Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD OGC; Britt, William, LTC, DoD OGC; Mizer, Brian, LT, DoD OGC
Subject: FW: United States v. Hamdan - Notice of Appearance for Counsel for Press Petitioners
Follow Up Flag: Follow up
Flag Status: Green
Attachments: Notice of Appearance in Hamdan for Schulz.pdf; Notice of Appearance in Hamdan for Zansberg.pdf

LTC [REDACTED]

I am forwarding, for appropriate disposition, Notices of Appearance and a Motion with attachments (to follow) at the request of counsel for various press entities. As indicated in the motion, defense counsel from this office and prosecution attorneys have been consulted on the motion.

Michael J. Berrigan
Deputy Chief Defense Counsel
Office of Military Commissions

[REDACTED]

From: Jake Goldstein [mailto:[REDACTED]]
Sent: Wednesday, November 21, 2007 2:35 PM
To: Berrigan, Michael, Mr, DoD OGC
Cc: David Schulz; Steve Zansberg
Subject: United States v. Hamdan - Notice of Appearance for Counsel for Press Petitioners

Dear Mr. Berrigan:

1. Thank you for agreeing to forward these papers for filing in the above-referenced commission. I understand that you will be forwarding these papers to the necessary parties and officials today.
2. Please enter an appearance with the United States v. Hamdan commission for David A. Schulz and Steven D. Zansberg on behalf of The Associated Press, Dow Jones & Company, Inc., The Hearst Corporation, The McClatchy Company, and The New York Times Company (collectively the "Press Petitioners"). Attached please find a Notice of Appearance form executed by David A. Schulz and a Notice of Appearance form executed by Steven D. Zansberg.

Sincerely,

Jacob Goldstein

Jacob P. Goldstein

Levine Sullivan Koch & Schulz

321 W. 44th Street, Suite 510

New York, NY 10036

[REDACTED]

[REDACTED]

[REDACTED]

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

NOTICE OF APPEARANCE

November 20, 2007

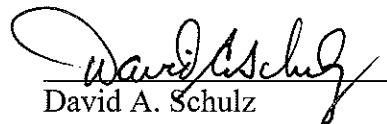
1. Pursuant to procedures of court/instruction for counsel, I, DAVID A. SCHULZ, hereby provide notice to the Military Judge of my appearance on behalf of The New York Times Company, The Associated Press, Dow Jones & Company, Inc., The Hearst Corporation, and The McClatchy Company (collectively the "Press Petitioners"). My office address, phone numbers, and email address are:

321 West 44th Street, Suite 510
New York, NY 10036

Phone: (212) 850-6100
[REDACTED]

I am an active member in good standing licensed to practice in the following jurisdictions:

New York
District of Columbia


David A. Schulz

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

NOTICE OF APPEARANCE

November 20, 2007

1. Pursuant to procedures of court/instruction for counsel, I, STEVEN D. ZANSBERG, hereby provide notice to the Military Judge of my appearance on behalf of The New York Times Company, The Associated Press, Dow Jones & Company, Inc., The Hearst Corporation, and The McClatchy Company (collectively the "Press Petitioners"). My office address, phone numbers, and email address are:

1888 Sherman Street, Suite 370
Denver, CO 80203



I am an active member in good standing licensed to practice in the following jurisdictions:

California
Colorado

A handwritten signature in cursive script that reads "Steven D. Zansberg".
Steven D. Zansberg

UNITED STATES v. SALIM AHMED
HAMDAN

BEFORE A MILITARY COMMISSION
CONVENED PURSUANT TO THE
MILITARY COMMISSIONS ACT OF 2006

November 28, 2007

*Amicus Brief filed by
Frank Fountain, Madeline Morris, and the
Duke Guantanamo Defense Clinic: Margarita
Clarens, Jason Cross, Allison Hester-Haddad,
Nora Keiser
[on behalf of Duke Guantanamo Defense
Clinic]*

1. My name is Frank Fountain. I certify that I am licensed to practice before the Supreme Court of Georgia. I further certify:

a. I am not a party to any Commission case in any capacity, I do not have an attorney-client relationship with any person whose case has been referred to a Military Commission, I am not currently nor am I seeking to be *habeas* counsel for any such person, and I am not currently nor am I seeking to be next-friend for such person.

b. I certify my good faith belief as a licensed attorney that the law in the attached brief is accurately stated, that I have read and verified the accuracy of all points of law cited in the brief, and that I am not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

2. **Issues Presented.** The issue presented is whether the commission has personal jurisdiction over Salim Hamdan under the Military Commissions Act of 2006.

3. **Statement of Facts.** This commission dismissed charges against Salim Hamdan on June 4, 2007 for lack of jurisdiction. Following the jurisdictional ruling of the Court of Military Commissions Review in U.S. v. Khadr, CMCR 07-001 (2007), and this commission's order of October 18, 2007, this commission will now consider whether it has jurisdiction to proceed with criminal proceedings in U.S. v. Hamdan.

4. The Law.

Under the MCA, an al Qaeda member who was part of a militia or volunteer corps, belonging to the regular armed forces of Afghanistan, which was under responsible command, wore a fixed distinctive sign recognizable at a distance, carried arms openly, and abided by the law of war, is a lawful enemy combatant and not subject to the jurisdiction of this military commission.

The MCA states that the term “lawful enemy combatant” means a person who is—

- (A) a member of the regular forces of a State party engaged in hostilities against the United States;
- (B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or
- (C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

10 U.S.C. § 948a(2).

Under the clear language and explicit intent of the MCA, then, if a combatant is a member of the regular armed forces of a state, that individual is a lawful combatant without the need to meet any further conditions or requirements—and a member of a militia or volunteer corps belonging to those regular armed forces is, likewise, a lawful combatant if the irregular force in question complies with the four conditions specified. 10 U.S.C. § 948a(2)(B).

The MCA states that the term “‘unlawful enemy combatant’ means a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces).” 10 U.S.C. § 948a(1)(i). To interpret that definition of “unlawful combatant” under the MCA as pronouncing a blanket exclusion of all Taliban, al-Qaeda, or associated forces from lawful combatant status, as the government has at times argued, would render incoherent the entire structure of the MCA.

The MCA recognizes, consistent with the law of war, that a Taliban member might be a lawful or unlawful combatant, depending upon the period during which he was a combatant. When the Taliban was in governmental power in Afghanistan, Taliban forces were the regular armed forces of Afghanistan. Taliban members captured at that time are entitled to lawful combatant status. Taliban members captured *after* the Taliban fell from power, by contrast, are not entitled to lawful combatant status, since they were not members of the regular armed forces of a state at the time of their capture.

That the Taliban was not recognized by the US as the government of Afghanistan is irrelevant to the analysis. Entitlement to lawful combatant status, under the MCA as under the Geneva Conventions, extends to all regular armed forces of a state, regardless of whether the government in power in that state is recognized by the detaining power. This is clearly reflected in MCA art 948(a)(2)(C), which states: “The term ‘lawful enemy combatant’ means a person who is . . . a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.” 10 U.S.C. § 948a(2)(C). See also GC III, art 4(A)(3).

In sum, the MCA recognizes and takes into account that different Taliban combatants may have different combatant statuses. The statute reflects that some captured Taliban detained by the US are entitled to POW status, and some are not, and that designation of the status of Taliban combatants, therefore, requires a factual determination in each instance. The MCA, therefore, specifically notes, in §948a(1)(i), that all those who come within the MCA’s definition of “unlawful combatant” shall be so designated, including those fitting the definition who are among “Taliban, Al Qaeda, and associated forces.”

The status of Taliban forces as lawful combatants during the period when Taliban constituted the regular armed forces of Afghanistan has definitive ramifications for the combatant status of *non*-Taliban combatants. Under the MCA, for any *irregular* forces to be considered lawful combatants in a given armed conflict, those irregulars must “belong to” the state party to the conflict. The MCA defines as a lawful combatant “a member of a militia, volunteer corps, or organized resistance movement *belonging to* a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war.” 10 U.S.C. § 948a(2)(B). If there were never any lawful *Taliban* combatants, then there could never have been *any* lawful combatants, whatsoever, in the conflict.

The MCA obviously anticipates that some individuals will come within its definition of lawful combatants. For that to occur, the Taliban combatants captured while they were the regular armed forces of Afghanistan must be recognized as lawful combatants, as is provided for by the MCA, § 948a(2)(C). And, members of irregular forces – al Qaeda or otherwise – belonging to the regular armed forces of Afghanistan, if those forces complied with the four conditions specified, also must be recognized as lawful combatants under the MCA. MCA, art. 948(a)(2)(b).

The MCA, read in this manner, is a coherent document that reflects and accounts for a complex factual situation. An interpretation excluding all Taliban or al Qaeda combatants from lawful combatant status, by contrast, would make nonsense of much of the MCA, making all of its provisions concerning combatant status superfluous, and its jurisdictional limitations virtually meaningless.

Blanket exclusion of all Taliban and al Qaeda combatants from lawful combatant status would lead to an absurd result.

As discussed immediately above, if the MCA defined *all* Taliban and al Qaeda members as *unlawful* combatants, then there would be, by definition, no lawful combatants in the very population whose treatment the MCA was designed, written, and enacted to govern. Were this court to adopt that interpretation, the entire category of “lawful combatants,” which Congress painstakingly distinguished and excluded from military commission jurisdiction, would be a null set. The framework of military commission jurisdiction articulated in the MCA—carefully defining and distinguishing between lawful and unlawful combatants—would be rendered superfluous and meaningless. Congress did not intend to legislate a meaningless distinction with an absurd result. This court, accordingly, should not accept an interpretation of the MCA that would have that effect. A statute should be read, if possible, in a way that does not render its provisions absurd. *Public Citizen v. Dept. of Justice*, 491 U.S. 441 (1989).

Pursuant to clear and centuries-old US Supreme Court precedent, the MCA can and should be interpreted in a manner consistent with the international law of war.

“An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). This rule of statutory interpretation is premised on the assumption that Congress ordinarily seeks to follow customary international law when legislating. *F. Hoffman-La Roche, Ltd v. Empagran S.A.*, 542 U.S. 155, 164 (2004). Any ambiguity in the statute should be resolved in favor of compliance with international law and our obligations thereunder. *Cf. McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). Ingrained in US jurisprudence, this canon directing courts to interpret federal law to avoid violating our international obligations has been relied upon for over two centuries. *See, e.g., Charming Betsy*, 6 U.S. at 118; *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (relying upon customary

international law in determining the statutory construction of the Jones Act in a maritime tort case); *Empagran*, 524 U.S. at 166 (looking to customary international law in interpreting the Sherman Act and concluding that it did not apply to a foreign price-fixing claim).

The distinction between lawful and unlawful combatants is a central feature of the law of war. The MCA's categories of lawful combatants are drawn directly from the Geneva Conventions of 1949, Article 4(A)(1, 2). Under the MCA, as under the GCs, membership in a state's regular armed forces itself establishes lawful combatant status, without any further conditions. Irregular forces "belong[ing] to" a state party to the conflict are to be considered lawful combatants if those forces comply with the four conditions specified.

It was entirely foreseen by the negotiators of the GCs that it would at times be distasteful to acknowledge the POW status of the regular armed forces of governmental regimes that the US does not recognize. Preparing in advance to resist the temptation to make ad hoc decisions about the POW status of regular armed forces of the enemy, the US agreed with its negotiating partners in 1949 that "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power" are nevertheless to be considered lawful combatants. GCIII art 4(A)(3). Similarly, the carefully deliberated decision was made to afford POW protections to irregular forces belonging to any regular armed forces if the irregular forces complied with the four conditions specified.

It is now time to honor those commitments that the US has made under the law of war and, thereby, to uphold the law-of-war protections for our own personnel in the event of their capture in the future. If the evidence shows that Salim Hamdan was a member of a militia or volunteer corps belonging to the Taliban at a time when the Taliban constituted the regular armed forces of Afghanistan, and if that militia or volunteer corps of which he was a member

complied with the four conditions specified in MCA art. 948(a)(2)(B), then this commission must find Salim Hamdan to be a lawful combatant and, as such, not subject to the jurisdiction of this commission.

Respectfully Submitted,

Frank W. Fountain

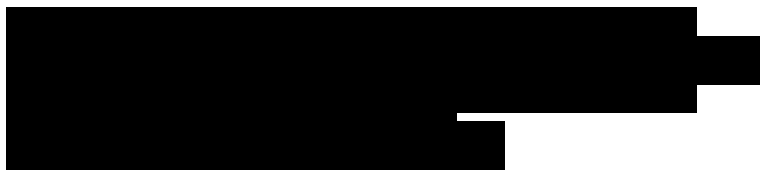
Frank Fountain, Esq.

[REDACTED]

Madeline Morris

Professor of Law

[REDACTED]



Auto forwarded by a Rule

Please find attached an amicus brief in the case of US v. Hamdan.

Thank you.

[REDACTED]

From: Allred, Keith J CAPT [REDACTED]
Sent: Friday, November 30, 2007 11:46 AM
To: Prasow, Andrea, Ms, DoD OGC; [REDACTED]
Cc: Schneider, Harry (Perkins Coie); McMillan, Joseph M. (Perkins Coie); Charles Swift; Mizer, Brian, LT, DoD OGC; [REDACTED] DoD OGC; David, Steven, COL, DoD OGC; Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD OGC; [REDACTED], DoD OGC
Subject: RE: U.S. v. Hamdan - Proposed Agenda and Details for R.M.C. 802 Conference
Follow Up Flag: Follow up
Flag Status: Orange

LTC [REDACTED]:

Please forward the following to counsel in this case:

Counsel:

RMC 802 authorizes the military judge to hold conferences with the parties, primarily to resolve routine or administrative matters. From the outline of the proposed agenda, I sense that there will be a dispute about the production of witnesses to testify at the upcoming hearing, the denial of immunity to a defense witness, and perhaps other matters.

The Discussion to RMC 802 indicates that "Occasionally, it may be appropriate to resolve certain issues, in addition to routine administrative matters, if this can be done with the consent of the parties. For example, a request for a witness which, if litigated and approved at trial, would delay the proceedings and cause expense or inconvenience, might be resolved at a conference. Note, however, that this could only be done by agreement of the parties and not by a binding ruling of the military judge."

In light of the expected controversy, I do not see the value in holding an 802 Conference. If the issues will ultimately need to be litigated, whether or not the Conference is held, I prefer to do so on the record and not hold a Conference where I cannot issue a ruling.

If Counsel discuss these issues among themselves, and represent to the court that the matters on the agenda can be resolved by agreement of the parties, I am available most of the day today for an 802 Conference.

I will monitor my email for your reply until 1600 East Coast time/1300 Pacific Coast time.

R,
Judge Allred

-----Original Message-----

From: Prasow, Andrea, Ms, DoD OGC [REDACTED]
Sent: [REDACTED]
To: [REDACTED]
Cc: Allred, Keith J [REDACTED] SW, CMJ; Schneider, Harry (Perkins Coie); Charles Swift; Mizer, Brian, LT, DoD OGC; [REDACTED], Joseph M. [REDACTED] LN1; David, Steven, COL, DoD OGC; Berrigan, Michael, Mr, [REDACTED], Trivett, Clayton, Mr, DoD OGC; [REDACTED], DoD OGC; [REDACTED]

Subject: U.S. v. Hamdan - Proposed Agenda and Details for R.M.C. 802 Conference

LTC [REDACTED]

The Defense has conferred with the Prosecution regarding their availability. The parties are available at 1030 PST/1330 EST tomorrow.

The dial-in number is 1-888-820-8656. Please enter pass code 541858#.

LTC Britt will be available for the Prosecution. Charles Swift, Harry Schneider, Joe McMillan, LT Brian Mizer and I will be available for the Defense.

The Defense proposes the following agenda. The relevant documents are attached to this email.

1. Defense request for witness interviews:

- Defense request for interviews of 5 detainees, November 20, 2007 (attached).
- Prosecution requested justification under R.M.C. 703, November 20, 2007 (attached).
- Defense replied that R.M.C. 701 was the relevant Rule, November 21, 2007 (attached).
- No reply to date from the Prosecution.

2. Defense request for production of witnesses:

- Defense request for production of nine witnesses (5 in GTMO, 3 in Yemen), November 28, 2007 (attached).
- If Defense request is denied, Defense will be forced to move to compel production and request continuance until witnesses are produced.

3. Defense request for immunity for Said Boujaadia:

- Defense request for testimonial immunity for Said Boujaadai, November 27, 2007 (attached).
- Convening Authority's denial of Defense request, November 29, 2007 (attached).
- Defense intends to file motion requesting military judge direct Convening Authority to grant immunity or to abate proceedings.

4. Defense motions may request continuance or abatement.

Respectfully submitted,
AJP

Andrea J. Prasow
Office of the Chief Defense Counsel

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Thursday, November 29, 2007 5:24 PM
To: Prasow, Andrea, Ms, DoD OGC; Britt, William, LTC, DoD OGC
Cc: [REDACTED]; 'Schneider, Harry (Perkins Coie)'; 'McMillan, Joseph M. (Perkins Coie)'; 'Charles Swift'; Mizer, Brian, LT, DoD OGC; Lindee, Kimberlee, LN1, DoD OGC; David, Steven, COL, DoD OGC; Berrigan, Michael, Mr, DoD OGC; Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD OGC; [REDACTED], DoD OGC; [REDACTED], DoD OGC; [REDACTED], DoD OGC
Subject: RE: U.S. v. Hamdan - Request for R.M.C. 802 Conference
Follow Up Flag: Follow up
Flag Status: Orange

Per CAPT Allred, he will be available tomorrow. He would like more information about the specific issues to be dealt with (a precise agenda), who will be on the call for each party, and what time is available for all parties to the call. Further, everyone will need to know the toll free number (and access code, if needed) for callers to use.

v/r,

[REDACTED]

Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

From: Prasow, Andrea, Ms, DoD OGC
Sent: Thursday, November 29, 2007 16:50
To: [REDACTED]; 'Schneider, Harry (Perkins Coie)'; 'McMillan, Joseph M. (Perkins Coie)'; Charles Swift; Mizer, Brian, LT, DoD OGC; [REDACTED] DoD OGC; David, Steven, COL, DoD OGC; Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD OGC; [REDACTED]
Subject: U.S. v. Hamdan - Request for R.M.C. 802 Conference

LTC [REDACTED]

The Defense respectfully requests a telephonic R.M.C. 802 session tomorrow, November 30th. The Defense has conferred with the Prosecution which does not oppose a conference to discuss issues relating to the Defense request for interviews and production of witnesses, as well as the Convening Authority's denial of the request for immunity for one of the Defense witnesses, Said Boujaadia. The Defense is available any time but notes that some Defense counsel are on the West coast.

Respectfully submitted,
AJP

Andrea J. Prasow
Office of the Chief Defense Counsel
Office of Military Commissions



[REDACTED]

From: Prasow, Andrea, Ms, DoD OGC
Sent: Friday, November 30, 2007 9:25 AM
To: [REDACTED]
Cc: [REDACTED]; Schneider, Harry (Perkins Coie); 'McMillan, Joseph M. (Perkins Coie)'; 'Charles Swift'; Mizer, Brian, LT, DoD OGC; [REDACTED] Mr, DoD OGC; Britt, William, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD OGC; [REDACTED]
Subject: U.S. v. Hamdan - Additional attachment to Agenda for R.M.C. 802 session
Follow Up Flag: Follow up
Flag Status: Orange
Attachments: RE: US v. Hamdan - Request for Interviews

[REDACTED],

Due to technical difficulties, the attached email referenced in the Defense proposed agenda for the R.M.C. 802 conference was inadvertently not included in LN1 Lindee's transmission yesterday evening of the relevant documents.

Respectfully submitted,
AJP

Andrea J. Prasow
Office of the Chief Defense Counsel
Office of Military Commissions

[REDACTED]



RE: US v. Hamdan -
Request for...

[REDACTED]

From: [REDACTED]
Sent: Thursday, November 29, 2007 6:40 PM
To: [REDACTED],
DoD OGC
Cc: CAPT Keith Allred; Schneider, Harry (Perkins Coie); McMillan, Joseph M. (Perkins Coie);
'Swift, Charles'; 'Charles Swift'; Mizer, Brian, LT, DoD OGC; Prasow, Andrea, Ms, DoD OGC;
LN1 Lindee GTMO [REDACTED], DoD OGC; David, Steven, COL, DoD OGC;
Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC; Stone, Tim, LCDR, DoD
OGC; Trivett, Clayton, Mr, DoD OGC; [REDACTED]
DoD OGC
Subject: Attachments for R.M.C. 802 Conference Call

Follow Up Flag: Follow up
Flag Status: Orange

Attachments: FW: US v. Hamdan - Request for Interviews; FW: US v. Hamdan - Request for Interviews; CA
Denial Immunity Boujaadia.pdf; Request for Immunity - Boujaadia.pdf; Request for Production
of Witnesses.pdf; Memorandum re Witness Interview Requests.pdf



FW: US v. Hamdan - Request for Interviews; FW: US v. Hamdan - Request for Interviews; CA
Denial Immunity Boujaadia.pdf; Request for Immunity - Boujaadia.pdf; Request for Production
of Witnesses.pdf; Memorandum re Witness Interview Requests.pdf

To all:

Here are the attachments that go with the agenda for the Conference Call tomorrow. Please note that the Defense Request to interview witnesses was originally submitted to the Prosecution on 15 November 2007 vice 20 November. The Defense submitted a follow-up request on 20 November.

Both of those e-mails are attached.

[REDACTED]

Pursuant to R.M.C. 703, the Defense requests that the Government provide the following witnesses for the Defense at the military commission session scheduled to commence at 1300 hours on 5 December 2007, at the Courtroom in Guantanamo Bay, Cuba.

1. Professor Brian Williams
University of Massachusetts at Dartmouth

[REDACTED]

[REDACTED]

Synopsis of Expected Testimony

Professor Williams will testify regarding the characteristics of al Qaeda members, the functions performed at properties used by al Qaeda, and the nature of al Qaeda fighters' participation in combat in Afghanistan prior to Mr. Hamdan's capture. Professor Williams will testify that both before and after September 11, 2001, in the continuing conflict in Afghanistan that concluded with the battle of Tora Bora, Arabs including some of Osama bin Laden's bodyguards and other associates fought as part of the 055 Ansars – an Arab brigade that supported Taliban forces.

Professor Williams will testify that the 055 carried arms openly, fought in uniform under an established chain of command and fought in conventional battles that conformed to the laws of war. He will testify that the leadership of the 055 rejected terrorist attacks against civilians as legitimate form of combat and did not permit person under their command to engage in such activities. Professor Williams will testify that, prior to September 11, 2001, the 055 Ansars were a recognized fighting force in world military communities including the Northern Alliance and that the Northern Alliance leadership promised to extend protection under the Geneva Convention to members of the Ansars who surrendered or were captured. He is expected to testify that the allegations against Mr. Hamdan conform to participation and/or support of the Ansars and not terrorist activities.

Relevance and Necessity of Testimony

Professor Williams is an expert on conflict in Islamic Central Asia, transnational jihadi militant movements and al Qaeda. He has conducted extensive field research in Afghanistan and throughout the Muslim world, including Kazakhstan, Uzbekistan, Kosovo, Muslim Spain and Jordan/Israel/Egypt. He is an Associate Professor in the Department of History at the University of Massachusetts at Dartmouth and has taught at several other institutions. He has worked as a consultant for the Central Intelligence Agency and Scotland Yard. He has published a book and is a frequent contributor to scholarly journals and news magazines. His most recent publications include *Taliban Fedayeen: The World's*

Worst Suicide Bombers?, Terrorism Monitor, July 19, 2007 and *Anbar's Sunni Militias: Fighting by Proxy*, Jane's Islamic Affairs, September 25, 2007. Professor Williams' testimony will bear directly on whether Mr. Hamdan is an unlawful enemy combatant within the meaning of the MCA and international law.

Professor Williams is testifying as an expert at no cost to the government beyond travel costs. He has served as an expert witness in multiple federal asylum hearings on behalf of persons from Southeast Asia in which their previous affiliations with organizations such as resistance forces and political or military groups was at issue. Professor Williams' *curriculum vitae* is appended to this request.

2. Khalid Shaykh Muhammad
Detention Center, Guantanamo Bay, Cuba

Synopsis of Expected Testimony

The Government has alleged that Mr. Muhammad is a senior al Qaeda leader and the head of al Qaeda's military committee. As the Government denied the Defense request to interview Mr. Muhammad, the Defense is unable to provide a more detailed synopsis of the Mr. Muhammad's expected testimony. However, based on publicly available statements made by the Government and Mr. Muhammad, the Defense believes Mr. Muhammad will testify regarding his role in al Qaeda and will testify that Mr. Hamdan was not a member of al Qaeda, or that he was not involved in either the planning or execution of acts that allegedly violate the law of war.

Relevance and Necessity of Testimony

Mr. Hamdan is accused of, *inter alia*, being a member of al Qaeda. Mr. Muhammad's alleged role in al Qaeda suggests he will be able to testify as to whether Mr. Hamdan was also a member of that organization and whether he participated in the planning or execution of acts that allegedly violated the law of war. Specifically, Mr. Hamdan is charged with conspiring with members of al Qaeda to violate the laws of war by hijacking aircraft, attacking civilians, and by engaging in terrorism. At his Combatant Status Review Tribunal Hearing on March 10, 2007, Mr. Muhammad admitted his involvement in virtually every terrorist act allegedly committed by al Qaeda since 1996. But he insisted that many of the Arabs captured in Afghanistan who are now detained at Guantanamo Bay were not members of al Qaeda and had no involvement in al Qaeda's terrorist activities. No person in U.S. custody other than Mr. Muhammad could be more familiar with the extent of Mr. Hamdan's involvement in al Qaeda, or whether he had any involvement at all.

3. Ramzi Bin al-Shib
Detention Center, Guantanamo Bay, Cuba

Synopsis of Expected Testimony

The Government has alleged that Mr. Bin al-Shib is a senior al Qaeda operative who was involved in the planning and execution of the attacks on the United States on September 11, 2001. As the Government denied the Defense request to interview Mr. Bin al-Shib, the Defense is unable to provide a more detailed synopsis of Mr. Bin al-Shib's expected testimony. However, based on publicly available statements made by the Government and Mr. Bin al-Shib, the Defense believes Mr. Bin al-Shib will testify regarding his role in al Qaeda and that Mr. Hamdan was not a member of Al Qaeda, or that he was not involved in either the planning or execution of acts that allegedly violated the law of war.

Relevance and Necessity of Testimony

Mr. Hamdan is accused of, *inter alia*, being a member of al Qaeda. Mr. Bin al-Shib's alleged role in al Qaeda suggests he will be able to testify as to whether Mr. Hamdan was also a member of the organization and whether he participated in the planning or execution of acts that allegedly violated the law of war.

4. Abu Faraj al Libi
Detention Center, Guantanamo Bay, Cuba

Synopsis of Expected Testimony

The Government has alleged that Mr. al Libi is a senior facilitator for al Qaeda. In this capacity, Mr. al Libi was allegedly responsible for caring for al Qaeda families and transporting al Qaeda fighters to and from Afghanistan. As the Government denied the Defense request to interview Mr. al Libi, the Defense is unable to provide a more detailed synopsis of Mr. al Libi's expected testimony. However, based on publicly available statements made by the Government, the Defense believes Mr. al Libi will testify regarding his role in al Qaeda and that he will further testify that Mr. Hamdan was not a member of al Qaeda, or that he was not involved in either the planning or execution of acts that allegedly violated the law of war.

Relevance and Necessity of Testimony

Mr. Hamdan is accused of, *inter alia*, being a member of al Qaeda. Mr. al Libi's alleged role in al Qaeda suggests he will be able to testify as to whether Mr. Hamdan was also a member of the organization and whether he participated in the planning or execution of acts that allegedly violated the law of war.

5. Said Boujaadia

Detention Center, Guantanamo Bay, Cuba

Synopsis of Expected Testimony

Mr. Boujaadia was captured and detained in Afghanistan at the same time as Mr. Hamdan. As the Government denied the Defense request to interview Mr. Boujaadia, the Defense is unable to provide a more detailed synopsis of Mr. Boujaadia's expected testimony. However, the Defense believes Mr. Boujaadia can testify that he was in a van with two men who were carrying weapons. Mr. Boujaadia is also expected to testify that Mr. Hamdan was not in the van with him and the weapons, and that Mr. Boujaadia did not meet Mr. Hamdan until after they were both captured by Afghan forces.

Relevance and Necessity of Testimony

Whether Mr. Hamdan was carrying missiles in his car at the time of his capture is an issue central to the determination of whether he is an unlawful enemy combatant. Mr. Boujaadia is an eyewitness to key facts relevant to that determination.

6. Abdul Rahim al-Sharqawi

Detention Center, Guantanamo Bay, Cuba

Synopsis of Expected Testimony

Mr. al-Sharqawi, a/k/a/ Riyadh the Facilitator, is alleged to have served as a facilitator for al Qaeda by making travel arrangements for al Qaeda fighters into Afghanistan. As the Government denied the Defense request to interview Mr. al-Sharqawi, the Defense is unable to provide a more detailed synopsis of Mr. al-Sharqawi's expected testimony. However, the Defense believes Mr. al-Sharqawi can testify that he knew Mr. Hamdan was one of Osama bin Laden's drivers or bodyguards but that Mr. Hamdan was neither a member of al Qaeda nor a combatant. He is expected to testify that Mr. Hamdan spent most of his time in Afghanistan working on cars. Government records contend that Mr. al-Sharqawi facilitated travel for al Qaeda members. The Defense anticipates that Mr. al-Sharqawi can testify that he never facilitated any travel for Mr. Hamdan.

Relevance and Necessity of Testimony

Mr. al-Sharqawi, who along with Mr. al-Libi facilitated the movements of al-Qaeda fighters to and from Afghanistan, has direct knowledge of Mr. Hamdan's activities in Afghanistan. Specifically, Mr. al-Sharqawi was in a position to know whether Mr. Hamdan was a combatant and whether he participated in the planning or execution of acts that allegedly violated the law of war.

7. Nasser al-Bahri

██████ Yemen

████████████████

████████████████ Testimony

Mr. al-Bahri served as Osama bin Laden's chief of security, and for a period of time headed up his bodyguard force. During that period of time he had personal knowledge as to the membership of bin Laden's bodyguard detail. Mr. al-Bahri is also Mr. Hamdan's brother-in-law. He is expected to testify that Mr. Hamdan never joined al Qaeda and had no interest in fighting. Mr. al-Bahri is expected to testify that Mr. Hamdan returned to Afghanistan in 2000 because he learned that Mr. al-Bahri was questioned by Yemeni security forces and was concerned that he would be considered suspicious because of his association with Mr. al-Bahri. Mr. al-Bahri will also testify that he was present when pictures of Mr. Hamdan were taken in which he appeared in uniform and accompanying Osama bin Laden and will testify as to the circumstances surrounding those pictures.

Relevance and Necessity of Testimony

Mr. al-Bahri's testimony is relevant as it will establish that Mr. Hamdan was not a member of al Qaeda during the time period alleged in the charge sheet, that Mr. Hamdan did not return to Afghanistan in 2000 to fight, and that Mr. Hamdan's associating with Osama bin Laden was purely professional. As Mr. al-Bahri is a family member of Mr. Hamdan, witness bias may be raised as an issue in the case. It is therefore essential that he testify in person so that the commission can judge his character and truthfulness.

8. Muhammed Ali Qassim al-Qala'a

██████████
Sana'a, Yemen

████████████████████

Synopsis of Expected Testimony

Mr. al-Qala is Mr. Hamdan's brother-in-law. He is expected to testify regarding Mr. Hamdan's religious and cultural beliefs, reputation in the community, lack of interest in fighting, and the reasons why Mr. Hamdan and his family were in Afghanistan in 2001. Mr. al-Qala is expected to testify that Mr. Hamdan is not a Muslim extremist, was not a member of al Qaeda and never espoused anti-American beliefs, had no interest in fighting and was in Afghanistan in 2001 for

employment purposes. Mr. al-Qala is expected to testify that Mr. Hamdan returned to Afghanistan in 2000 because Mr. al-Qala informed him that Yemeni security forces had interviewed their brother-in-law and that it was not safe for Mr. Hamdan to return to Sana'a.

Relevance and Necessity of Testimony

Mr. al-Qala's testimony is relevant as it will establish Mr. Hamdan's nature of peacefulness and that he was not a fighter. Mr. al-Qala's testimony is also relevant to the circumstances surrounding Mr. Hamdan's travel to Yemen in 2000 and his return to Afghanistan. As Mr. al-Qala is a family member of Mr. Hamdan, witness bias may be raised as an issue in the case. It is therefore essential that he testify in person so that the commission can judge his character and truthfulness.

9. Umat al-Subur Ali Qassim al-Qala'a

 Yemen


Synopsis of Expected Testimony

Mrs. al-Qala is Mr. Hamdan's wife. She is expected to testify as to Mr. Hamdan's reasons for traveling to Afghanistan in 1999 and 2001 and the reason Mr. Hamdan did not leave Afghanistan with his wife in 2001. Mrs. al-Qala is expected to testify that Mr. Hamdan traveling to Afghanistan in 1999 with her in search of employment and that he never joined al-Qaeda. Mrs. al-Qala is also expected to testify that Mr. Hamdan and she returned home to Yemen in August 2000 with the intent of remaining there. However, Yemeni security forces questioned Mr. Hamdan's brother-in-law and he decided it would be safer for his family to return to Afghanistan and to return to his previous employment. Mrs. al-Qala is expected to testify that Mr. Hamdan returned to Afghanistan after taking her and their daughter to the Pakistani border because it was not safe for Arab men to cross at that time.

Relevance and Necessity of Testimony

Mrs. al-Qala's testimony will establish that Mr. Hamdan was not a member of al-Qaeda. As Mrs. al-Qala is a family member of Mr. Hamdan, witness bias may be raised as an issue in the case. It is therefore essential that she testify in person so that the commission can judge her character and truthfulness.

Curriculum Vitae

CV

Field Research

Publications

Conference Papers

Interviews

Home



The Book



[REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

- [REDACTED]
- [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Suki
Design

MEMORANDUM

November 21, 2007

From: Professor Charles Swift, Civilian Defense Counsel

To: Colonel William Britt, Military Prosecutor

Re: Prosecution Request for Information required by 703(c)(2)(B)(i) in conjunction with request to interview detainees at Guantánamo Bay

1. To the best of the Defense's knowledge and belief, prior to permitting an interview of a detainee by defense counsel, other than counsel's client, the Joint Task Force Commander requires the permission of the prosecution. Accordingly, the Defense forwarded to the prosecution on November 15, 2007 a request by e-mail to interview Said Boujaadia, ISN 0150, Khalid Shaykh Muhammad, ISN 10024, Ramzi Bin al-Shib, ISN 10013, Abu Faraj al Libi, ISN 10017, and Abdul Rahim al-Sharqawi, ISN unknown.

2. On November 20, 2007, the prosecution responded by e-mail, requesting information required by R.M.C 703(c)(2)(B)(i) in conjunction with the Defense request to interview the above-mentioned detainees. The Defense disputes the prosecution's right to information under R.M.C. 703. R.M.C. 703 relates to the production of witnesses. The Defense is not at this time seeking the production of the witnesses listed in its e-mail of November 15, 2007. Rather, the Defense seeks only the prosecution's permission to interview the above listed detainees. Accordingly, the Defense does not believe that R.M.C. 703 is germane to its request. Instead, the Defense believes that the relevant R.M.C. is 701(j) (*Access to witnesses and evidence.*). R.M.C. 701(j) provides that "each party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence." The Defense asserts that the withholding of permission to interview a detainee absent a summary of what the detainee's testimony is expected to be constitutes an unreasonable impediment to access. A requirement that the Defense proffer the expected testimony of a potential witness before interviewing that witness is contradictory to the purpose of such an interview and creates an unreasonable barrier to counsel's investigation in preparation of a defense for Mr. Hamdan.

3. The Defense agrees that for such a request to be reasonable there must be a reasonable expectation that the interview could lead to relevant testimonial or physical evidence. The Defense believes in this case that the potential for relevant evidence with respect to the above-referenced detainees was self-evident. Nevertheless, to prevent further delay, the Defense clarifies the purpose of the interviews as follows:

a) With respect to Said Boujaadia - Mr. Boujaadia was present at the time of Mr. Hamdan's capture and has direct knowledge of the circumstances relating to Mr. Hamdan's capture and any possible hostile act made by Mr. Hamdan immediately prior to capture. The Defense has previously interviewed Mr. Boujaadia, however, at the time of the interview the question of whether Mr. Hamdan was a lawful combat and the charges related to transportation of surface-to-air missiles were not at issue. Accordingly

the Defense seeks to re-interview Mr. Boujaadia prior to proffering him as a potential witness in Mr. Hamdan's December 5, 2007 pretrial hearing.

b) With respect to the remaining detainees - based on the Defense's knowledge and belief, each possess detailed information on the membership and activities of Al Qaeda. Mr. Hamdan's alleged membership in and/or support of Al Qaeda is directly relevant to the December 5 hearing. Accordingly, the Defense does not believe that it is unreasonable to interview these detainees prior to determining whether to proffer them as witnesses for the hearing.

If the prosecution nevertheless believes that a summary of testimony is required prior to granting permission to interview the above detainees, the Defense requests that denial of its request for interviews be made at the earliest opportunity in order to facilitate prompt judicial review.

C. D. Swift

27 November 2007

From: Charles D. Swift, Civilian Defense Counsel
To: Convening Authority, Office of Military Commissions

Subj: REQUEST FOR IMMUNITY

1. Pursuant to Rule for Military Commissions (R. M.C.) 704 and Regulation for Trial by Military Commissions (Regulation) 15 – 3(b), the Defense hereby submits the following request for immunity:

1. Name of Proceeding – *United States v. Salim Ahmed Hamdan*.
2. Name of Witness – Said Boujaadia, ISN 0150.
3. Name of Military Command to which the witness is assigned – Mr. Boujaadia is under the control of Commander, Joint Task Force Guantanamo.
4. Date and Place of Birth. Mr. Boujaadia is approximately 39 years old and a citizen of Morocco. The Defense is unaware of Mr. Boujaadia's place of birth but believes he was born on 5 May 1968.
5. FBI file number – Unknown.
6. State and Federal Charges. The Defense is not aware of any state or federal criminal charges are pending against Mr. Boujaadia. The Defense is aware that Prosecution previously stated in a conversation with the Defense that it was considering charging Mr. Boujaadia. The Defense notes, however, that subsequent to this conversation neither Mr. Hamdan's charge regarding the alleged conspiracy to commit murder by transporting surface-to-air missiles was amended to name Mr. Boujaadia nor have charges been sworn against Mr. Boujaadia. Consequently, the Defense submits that there is no evidence that the Prosecution actually intends to go forward with charges against Mr. Boujaadia.
7. Whether the Witness is Currently Incarcerated - Mr. Boujaadia is currently detained at Naval Station Guantanamo Bay. In February 2007, Mr. Boujaadia was cleared for transfer to Morocco by the Office for the Administrative Review of the Detention of Enemy Combatants. While Mr. Boujaadia was awaiting diplomatic clearance of his transfer, the Office of the Chief Prosecutor contacted military defense counsel to inform counsel of the transfer and to inquire whether the Defense would be willing to join a request for Mr. Boujaadia's release to be placed on hold. The Defense declined to join the request and requested that the Prosecution agree to a video deposition as an alternative to further detention of Mr. Boujaadia. The Prosecution declined agreement, and subsequently submitted an *ex parte* request that Mr. Boujaadia not be transferred. To the Defense's information and belief the Prosecution's request was granted. (See Enclosed letter from Mr. Boujaadia's counsel dated November 20, 2007.)

8. Background of Proceeding – Mr. Boujaadia’s testimony is sought both in conjunction with the substantive charges of conspiracy to commit murder in violation of the law of war (Charge 1, Specification 2) and providing material support for terrorism by providing surface to air missiles (Charge 2, Specifications 3 and 4), and in conjunction with Mr. Hamdan’s pre-trial jurisdictional hearing concerning his combatant status scheduled for December 5, 2007. (Referred charges attached.) Based on representations by the Prosecution, the Defense anticipates that the Government will offer evidence concerning the circumstances of Mr. Hamdan’s capture at the December 5 hearing. As an eyewitness to the events surrounding Mr. Hamdan’s capture, Mr. Boujaadia’s testimony will be essential to challenge the Government’s assertion that Mr. Hamdan was captured while traveling with other fighters and while transporting weapons.
9. Statement of Expected Testimony and Necessity – Mr. Boujaadia was captured in the same operation and by the same indigenous forces as Mr. Hamdan. Based on the Defense’s interview of Mr. Boujaadia in September 2004, Mr. Boujaadia is expected to testify that prior to capture he was traveling in a separate vehicle from Mr. Hamdan; that in the vehicle with him were two Egyptians who were both carrying weapons; that when stopped by indigenous forces, these individuals engaged in a fire fight and were subsequently killed. Subsequent to his capture, Mr. Boujaadia stated during interrogation that he was “90 percent sure that Mr. Hamdan was the driver of the vehicle.” During the Defense interview of Mr. Boujaadia, he corrected this statement and denied meeting Mr. Hamdan until after his capture.
10. Mr. Boujaadia’s testimony is necessary because it establishes the existence of a second vehicle and the presence of other armed men in that vehicle. Further, it establishes that Mr. Hamdan was not part of this group and that this group was the potential source for both the surface-to- air missiles and papers allegedly seized in conjunction with Mr. Hamdan’s capture. Testimony relevant to Mr. Hamdan’s possession of surface-to-air missiles is relevant both to his combatant status and to the charges against him. To the Defense’s knowledge and belief, Mr. Boujaadia is the only available eye witness to these events.

Based on communications with Mr. Boujaadia’s counsel, the Defense anticipates that Mr. Boujaadia, to the extent permitted by law, will refuse to testify absent a grant of immunity. In particular, Mr. Boujaadia’s counsel is concerned that Mr. Boujaadia will be subject to retaliatory detention should he testify favorably to Mr. Hamdan. Accordingly, in addition to testimonial immunity, counsel seeks a guarantee from the Convening Authority that the Convening Authority will direct the Office of the Chief Prosecutor to lift the hold placed on Mr. Boujaadia’s transfer once he has testified. Providing that Mr. Boujaadia’s testimony is videotaped for use at trial, the Defense would have no objection to Mr. Boujaadia’s release as the subject matter of both the criminal charges and the combatant status hearing involve identical facts.

11. Willingness to Testify With Grant of Immunity – Based on Mr. Boujaadia’s counsel’s representations, if immunity is granted the Defense anticipates that Mr. Boujaadia will testify.

12. Timeliness- The Defense notes that this request is not submitted in sufficient time to permit three weeks' consideration as required by Regulation 15-3(b). The Defense was unable comply with this requirement because Defense has not yet been served with discovery by the Prosecution. The Defense only became aware of the source, extent, and nature of the Government's evidence relating to Mr. Hamdan's capture on November 16, 2007 during a meeting with the Prosecution. Subsequent to that meeting the necessity for Mr. Boujaadia's testimony at the hearing became apparent. Thereafter, counsel contacted Mr. Boujaadia's attorney to confirm that Mr. Hamdan would be calling Mr. Boujaadia as a witness and, on November 20, 2007, Mr. Boujaadia's counsel responded with the attached letter necessitating this request. Accordingly, the Defense requests that the three week period in advance of granting testimonial immunity be waived. If the Convening Authority is unwilling to waive the three week consideration requirement, the Defense requests to be notified as soon as possible so that the Defense may seek an appropriate extension of time in conjunction with Mr. Hamdan's December 5, 2007 hearing.

/s/

C.D. Swift
Civilian Defense Counsel
Visiting Professor of Law
Emory University
1301 Clifton Road
Atlanta, GA 303022
Office: [REDACTED]

Attachment A



Reprive
PO Box 52742
London
EC4P 4WS

Tel: 020 7353 4640
Fax: 020 7353 4641
Email: info@reprive.org.uk
Website: www.reprive.org.uk

November 20, 2007

Charles D. Swift, JD, LLM
Acting Director of the International Humanitarian Law Clinic and Visiting Associate
Professor
Emory University School of Law

Re: Said Boujaadia, ISN 150

Dear Mr. Swift:

I write regarding my client Said Boujaadia. I understand that it is your wish to call Mr. Boujaadia as a witness in the Military Commission proceedings against Salim Hamdan.

The Office for the Administrative Review of the Detention of Enemy Combatants informed me in February 2007 that Mr. Boujaadia had been "approved to leave Guantánamo, subject to the process for making appropriate diplomatic arrangements for his departure." However, he has remained a prisoner. I had been perplexed by this, as one of our other Moroccan clients who had been cleared, Ahmed Errachidi, was sent home in April 2007 and is now free with his family. I could not understand why Mr. Boujaadia was not on the same plane back to Morocco. Mr. Boujaadia is a father of three children, only 10, 9 and 8 years old. His elderly mother is unwell and desperately wants to see her son before she dies. Like Mr. Errachidi, Mr. Boujaadia should be with his loved ones.

You have now explained what happened, and I am deeply disturbed. I understand that my cleared client is still in Guantánamo Bay, months later, solely because Carl Britt, Acting Chief Prosecutor in Guantánamo, placed a hold on his transfer, because Mr. Boujaadia *might* at some point be a witness in the case of Mr. Hamdan. I understand that Mr. Britt asked you to put a hold on Mr. Boujaadia, who would be a witness exculpating your client. I understand, further, that you said this would be totally unnecessary as under the commission rules you could both depose my client on videotape, and use such a statement in lieu of testimony. A videotape deposition would end any pretext that it might be necessary to hold Mr. Boujaadia one moment longer. When you refused to keep Mr. Boujaadia in Guantánamo Bay, Mr. Britt then imposed his own hold, denying Mr. Boujaadia the chance to go home to Morocco.

All of this was done by Mr. Britt without so much as a courtesy call to me about my client. In the meantime, I have been urgently working to secure Mr. Boujaadia's release, wholly unaware that the entire process had been secretly short-circuited by Mr. Britt.

I find this action by Mr. Britt reprehensible. Mr. Boujaadia's freedom should not in any way be compromised because he *might* at some point serve as a witness in another prisoner's case. There are countless ways to ensure Mr. Boujaadia's testimony is available for Mr. Hamdan's proceedings – without keeping him in Guantanamo Bay, let alone in the particularly harsh conditions of Camp 6, where he is housed.

I am willing to consent to your calling Mr. Boujaadia as a witness if all the following conditions are met:

First, I must obviously be permitted to discuss this matter with Mr. Boujaadia before you or anyone representing Mr. Hamdan, or anyone from the prosecution, speaks with Mr. Boujaadia. I must also be permitted to be present during any questioning of him by either the prosecution or defense. This would include any testimony before the Military Commission itself or any of its officers.

Second, Mr. Boujaadia must be offered complete testimonial immunity. This is clearly permitted by the commission rules.

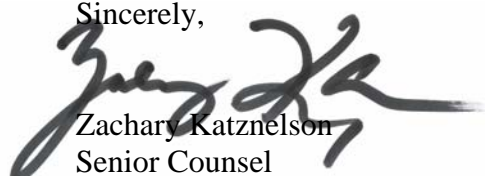
Third, Mr. Boujaadia's testimony must be taken as soon as possible after I meet with him, in a manner that will ensure that it is available as needed in future Commission proceedings. This should be completed by December 5, 2007, the date of your scheduled hearing. There can be no excuse for failing to conclude everything by that time, since Mr. Boujaadia's repatriation has already been delayed for several months in this inexcusable manner.

Fourth, that immediately after Mr. Boujaadia provides this testimony, Mr. Britt (or the relevant official) shall lift the hold against Mr. Boujaadia's transfer and that every effort be made to return Mr. Boujaadia immediately to his wife and children in Morocco.

My obvious concern is that if Mr. Boujaadia provides evidence exculpating your client, he will be subject to retributive sanctions by the prosecution. My concerns here are exacerbated by the fact that Mr. Britt has already punished my client by secretly barring him from returning to his family. Additionally, you have explained to me that Mr. Britt has threatened to charge Mr. Boujaadia as a co-conspirator with Mr. Hamdan. This is absurd, given the fact that Mr. Boujaadia has already been cleared by the U.S. government. The only possible reason for this threat is that Mr. Boujaadia may be willing to provide honest testimony for your client.

I look forward to your prompt response. Many thanks.

Sincerely,



Zachary Katznelson
Senior Counsel

27 November 2007

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Atlanta, GA 303022
[REDACTED]

Attachment A



Reprieve
PO Box 52742
London
EC4P 4WS

Tel: 020 7353 4640
Fax: 020 7353 4641
Email: info@reprieve.org.uk
Website: www.reprieve.org.uk

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Emory University School of Law

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Registered Office 2-6 Cannon Street London EC4M 6YH
Patrons: Alan Bennett, Martha Lane Fox, Sir John Mortimer, Jon Snow, Marina Warner, Sir Charles Wheeler

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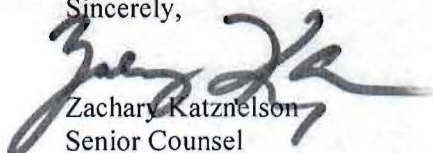
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Zachary Katznelson
Senior Counsel

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Registered Office 2-6 Cannon Street London EC4M 6YH
Patrons: Alan Bennett, Martha Lane Fox, Sir John Mortimer, Jon Snow, Marina Warner, Sir Charles Wheeler

[REDACTED]

From: Britt, William, LTC, DoD OGC
Sent: Tuesday, November 20, 2007 4:25 PM
To: Prasow, Andrea, Ms, DoD OGC
Cc: Stone, Tim, LCDR, DoD OGC; Murphy, John, Mr, DoD OGC
Subject: RE: US v. Hamdan - Request for Interviews
Signed By: [REDACTED]

Ms. Prasow - please provide the information required by R.C.M. 703(c)(2)(B)(i). Thank you. wbb.

WILLIAM B. BRITT
LTC, JA, USAR
Deputy Chief Prosecutor
OFFICE OF MILITARY COMMISSIONS
[REDACTED]

CONFIDENTIALITY NOTICE: This electronic transmission may contain attorney work-product or information protected under the attorney-client privilege, both of which are protected from disclosure under the Freedom of Information Act, 5 USC 552. Do not release outside of DoD channels without prior authorization from the sender.

From: Prasow, Andrea, Ms, DoD OGC
Sent: Tuesday, November 20, 2007 9:42 AM
To: Britt, William, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC
Cc: Mizer, Brian, LT, DoD OGC
Subject: FW: US v. Hamdan - Request for Interviews

Gentlemen,

As travel may be difficult with the upcoming holiday, please confirm if you will be facilitating these witness interviews in advance of the 28 November deadline to disclose the identity of witnesses and to provide the commission with a synopsis of the expected testimony.

Thank you,
AJP

From: Prasow, Andrea, Ms, DoD OGC
Sent: Thursday, November 15, 2007 14:36
To: Britt, William, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC
Cc: Mizer, Brian, LT, DoD OGC
Subject: US v. Hamdan - Request for Interviews

Gentlemen,

As you know, the list of witnesses and evidence upon which we intend to rely for the December 5 hearing is due on 28 November. In order to determine whether we will call certain people as witnesses, we need the opportunity to interview them in advance. Accordingly, we request your assistance in securing the opportunity to interview the following persons for the limited purpose of preparing for the December 5 hearing. We do not waive the opportunity to seek additional interviews with them to prepare for trial.

Khalid Shaykh Muhammad, [REDACTED]

Ramzi Bin al-Shib, [REDACTED]

Abu Faraj al Libi, [REDACTED]

Said Boujaadia, [REDACTED]

Abdul Rahim al-Sharqawi

Please let us know what additional information you might require from us in order to schedule these interviews.

Thank you,
AJP

Andrea J. Prasow
Office of the Chief Defense Counsel
Office of Military Commissions

[REDACTED]

[REDACTED]

[REDACTED] Andrea, Ms, DoD OGC
Sent: Thursday, November 29, 2007 6:28 PM
To: [REDACTED]
Subject: FW: US v. Hamdan - Request for Interviews
Signed By: [REDACTED]

From: Prasow, Andrea, Ms, DoD OGC
Sent: Tuesday, November 20, 2007 09:42
To: Britt, William, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC
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Andrea J. Prasow
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Office of Military Commissions



[REDACTED]

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Signed [REDACTED]

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Thank you,
AJP

Andrea J. Prasow
Office of the Chief Defense Counsel
Office of Military Commissions

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Friday, November 30, 2007 5:00 PM
To: Prasow, Andrea, Ms, DoD OGC; Mizer, Brian, LT, DoD OGC; Britt, William, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC
Cc: [REDACTED]; 'Schneider, Harry (Perkins Coie)'; 'McMillan, Joseph M. (Perkins Coie)'; 'Charles Swift'; [REDACTED], DoD OGC; David, Steven, COL, DoD OGC; Berrigan, Michael, Mr, DoD OGC; Trivett, Clayton, Mr, [REDACTED], OGC; [REDACTED], SSG, DoD OGC; [REDACTED]
Subject: FW: U.S. v. Hamdan - Special Request for Relief - Continuance
Follow Up Flag: Follow up
Flag Status: Yellow
Attachments: US v. Hamdan (4.63 KB)



US v. Hamdan
(4.63 KB)

CAPT Allred has directed that I send the email below to counsel and all parties.

v/r,

LTC Mike [REDACTED], USAR
Senior At [REDACTED] Advisor
Military Commissions Trial Judiciary
Department of Defense

-----Original Message-----

From: Allred, Keith J CAPT NAVMARTRIJUDCIR SW, CMJ [REDACTED]
Sent: 30, 2007 16:46
To: [REDACTED] TC, DoD OGC
Subject: Hamdan - Special Request for Relief - Continuance

LTC [REDACTED]

Please forward the following email to the parties in US v. Hamdan:

The request for continuance filed by the defense this date is denied.

Respectfully,

Keith J. Allred
Captain, JAGC, USN
Military Judge

-----Original Message-----

From: Prasow, Andrea, Ms, DoD OGC [mailto:[REDACTED]]
Sent: [REDACTED]

[REDACTED] Allred, Keith J CAPT NAVMARTRIJUDCIR SW, CMJ; Schneider, Harry (Perkins Coie);
[REDACTED] Lindee,
[REDACTED] ritt,

Willi one, Tim; Trivett, Clayton, Mr, DoD OGC; [REDACTED], DoD
OGC; [REDACTED], DoD OGC
Subje Special Request for Relief - Continuance

LTC [REDACTED],

Please accept this special request for relief for filing in the case of United States v. Hamdan.

1. On 15 November 2007, the Defense requested the opportunity to interview five detainees to determine if the Defense wished to request their production as witnesses at the hearing scheduled for 5 December 2007.
2. On 20 November 2007, the Defense contacted the Prosecution to reiterate its request to interview five detainees.
3. On 20 November 2007, the Prosecution requested justification pursuant to R.M.C. 703.
4. On 21 November 2007, the Defense responded by memorandum to the Prosecution asserting that access to witnesses in advance of requesting their production was governed by R.M.C. 701.
5. To date, the Defense has not received a response from the Prosecution regarding its request for interviews.
6. On 28 November 2007, pursuant to an Order from the commission, the Defense requested the production of nine witnesses - five detainees, three witnesses located in Yemen, and one expert located in Massachusetts.
7. On 29 November 2007, the Defense alerted the commission that it was considering seeking a continuance if the potential witnesses were not produced for interviews and/or if the requested witnesses were not produced for examination at the 5 December hearing.
8. On 29 November 2007, the Defense also alerted the commission that its request for immunity for one of the detainees had been denied by the Convening Authority and that the Defense intended to seek an order from the commission to direct the Convening Authority to grant immunity or, in the alternative, to abate the proceedings.
9. On 30 November 2007, having not received a response to its request for production of witnesses, the Defense contacted the Prosecution at 1300 at which time the Prosecution informed the Defense it objects to the production of all requested witnesses.
10. At this time, the parties are unable to reach agreement as to the request for potential witness interviews and the production of witnesses.
The Defense memorialized its understanding in an email to the Prosecution earlier today (attached).
11. The Defense intends to file (1) a motion for immunity for Said Boujaadia, or, in the alternative, abatement; (2) a motion to compel access to potential witnesses for interview in advance of any hearing; and (3) at the appropriate time, a motion to compel production of witnesses for examination at a hearing. Each motion will request continuance or abatement until such time as the necessary interviews are conducted and the relevant witnesses are produced.
12. The Defense would be prepared to file the appropriate motions NLT 1630 EST on 4 December 2007. The Defense believes such motions can be resolved without oral argument.
13. The Defense accordingly requests a continuance of the 5 December hearing until after the above-referenced motions are fully briefed by the parties and considered by the commission.
14. The Defense has conferred with the Prosecution on this Special Request.
The Prosecution has not formulated a response.

Respectfully submitted,
AJP

Andrea J. Prasow

unsel



<<...>>

[REDACTED]

From: McMillan, Joseph M. (Perkins Coie) [REDACTED]
Sent: Friday, November 30, 2007 2:15 PM
To: Britt, William, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC
Cc: Schneider, Harry (Perkins Coie); [REDACTED] Prasow, Andrea, Ms, DoD OGC;
Mizer, Brian, LT, DoD OGC
Subject: US v. Hamdan

Col. Britt:

We understand that, at the present time, the Prosecution has not agreed to the Defense request for witness interviews or the production of the witnesses.

The Defense proposes to inform the Commission that:

(1) the parties are unable to reach agreement on the Defense's November 15 request for witness interviews prior to the December 5 hearing and the Defense's November 28 request for production of witnesses at that hearing;

(2) the parties agree that this issue should be decided prior to the commencement of the December 5 hearing, and that the Commission should decide the issue on a complete record with full briefing.

(3) accordingly, the Defense intends to move promptly:

(a) to compel witness interviews prior to the jurisdictional hearing;

(b) to compel the production of witnesses at the jurisdictional hearing; and

(c) for an order requiring testimonial immunity for Said Boujaadia, to permit him to testify at the jurisdictional hearing.

The Defense believes that because these are issues of great significance, and matters of first impression before the Commission, the briefing on these matters should not be done on shortened time; rather, it should be done in a deliberate and thoughtful manner under the normal briefing schedule permitted by the RMC. Because that cannot be done before the December 5 hearing, the Defense intends to seek a continuance.

May we represent to the Commission that the Prosecution, while not joining in the motion for a continuance, does not oppose it?

Joe McMillan
Perkins Coie LLP

[REDACTED]

[REDACTED]

From: Prasow, Andrea, Ms, DoD OGC

Sent: Friday, November 30, 2007 3:59 PM

To: [REDACTED]

Cc: [REDACTED]; Schneider, Harry (Perkins Coie); 'McMillan, Joseph M. (Perkins Coie)'; Charles Swift; Mizer, Brian, LT, DoD OGC [REDACTED], DoD OGC; David, Steven, COL, DoD OGC; Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD OGC; Cox [REDACTED]
[REDACTED]

Subject: U.S. v. Hamdan - Defense Proposed Trial Schedule

Signed By: [REDACTED]

Follow Up Flag: Follow up

Flag Status: Yellow

Attachments: Defense Proposed Trial Schedule.doc

[REDACTED],

Attached please find the Defense Proposed Trial Schedule.

Respectfully submitted,
AJP

Andrea J. Prasow
Office of the Chief Defense Counsel
Office of Military Commissions
[REDACTED]

<<...>>

Defense Proposed Trial Schedule – U.S. v. Hamdan

Evidentiary Hearing	Wednesday, 5 December 2007
Deadline for Prosecution to Provide Discovery	Friday, 11 January 2008
Initial hearing on Legal Motions	Monday, 4 February 2008
Deadline for Legal Motions	Friday, 29 February 2008
Hearing re Remaining Legal Motions	Thursday, 20 March 2008 OR Friday, 21 March 2008
Deadline for Govt to Submit List of Witnesses	Thursday, 27 March 2008
Defense Discovery Deadline	Friday, 18 April 2008
Deadline for Defense to Submit Witness List	Friday, 18 April 2008
Hearing re Witness Production/ Unresolved Issues	Friday, 2 May 2008
Evidentiary Motions Deadline	Friday, 6 June 2008
Evidentiary Motions Hearing	Thursday, 26 June 2008
Deadline for Defense Requests for Govt Assistance in Obtaining Witnesses for Use on the Merits	Friday, 18 July 2008
Assembly & Voir Dire (Trial Date)	Monday, 4 August 2008

[REDACTED]

From: Britt, William, LTC, DoD OGC
Sent: Friday, November 30, 2007 3:38 PM
To: Prasow, Andrea, Ms, DoD OGC; [REDACTED]
Cc: [REDACTED]; 'Schneider, Harry (Perkins Coie)'; 'McMillan, Joseph M. (Perkins Coie)'; 'Charles Swift'; Mizer, Brian, LT, DoD OGC; [REDACTED], DoD OGC; David, Steven, COL, DoD OGC; Berrigan, Michael, Mr, DoD OGC; Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD OGC; [REDACTED]
Subject: RE: U.S. v. Hamdan - Special Request for Relief - Continuance
Signed By: [REDACTED]
Follow Up Flag: Follow up
Flag Status: Yellow
Attachments: Proposed Trial Schedule - 30 NOV 2007.doc

Sir/ALCON - Proposed trial schedule. Note that I have placed a question mark next to 5 December to reflect the issue pending concerning the defense request for a continuance. Thank you. LTC Britt.

WILLIAM B. BRITT

LTC, JA, USAR
Deputy Chief Prosecutor
OFFICE OF MILITARY COMMISSIONS
[REDACTED]

CONFIDENTIALITY NOTICE: This electronic transmission may contain attorney work-product or information protected under the attorney-client privilege, both of which are protected from disclosure under the Freedom of Information Act, 5 USC 552. Do not release outside of DoD channels without prior authorization from the sender.

From: Prasow, Andrea, Ms, DoD OGC
Sent: Friday, November 30, 2007 3:13 PM
To: [REDACTED]
Cc: [REDACTED]; 'Schneider, Harry (Perkins Coie)'; 'McMillan, Joseph M. (Perkins Coie)'; 'Charles Swift'; Mizer, Brian, LT, DoD OGC; [REDACTED] LN1, DoD OGC; David, Steven, COL, DoD OGC; Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD OGC; [REDACTED]
Subject: U.S. v. Hamdan - Special Request for Relief - Continuance

LTC [REDACTED]

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Respectfully submitted,
AJP

Andrea J. Prasow
Office of the Chief Defense Counsel
Office of Military Commissions

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Prosecution Proposed Trial Schedule, 30 November 2007

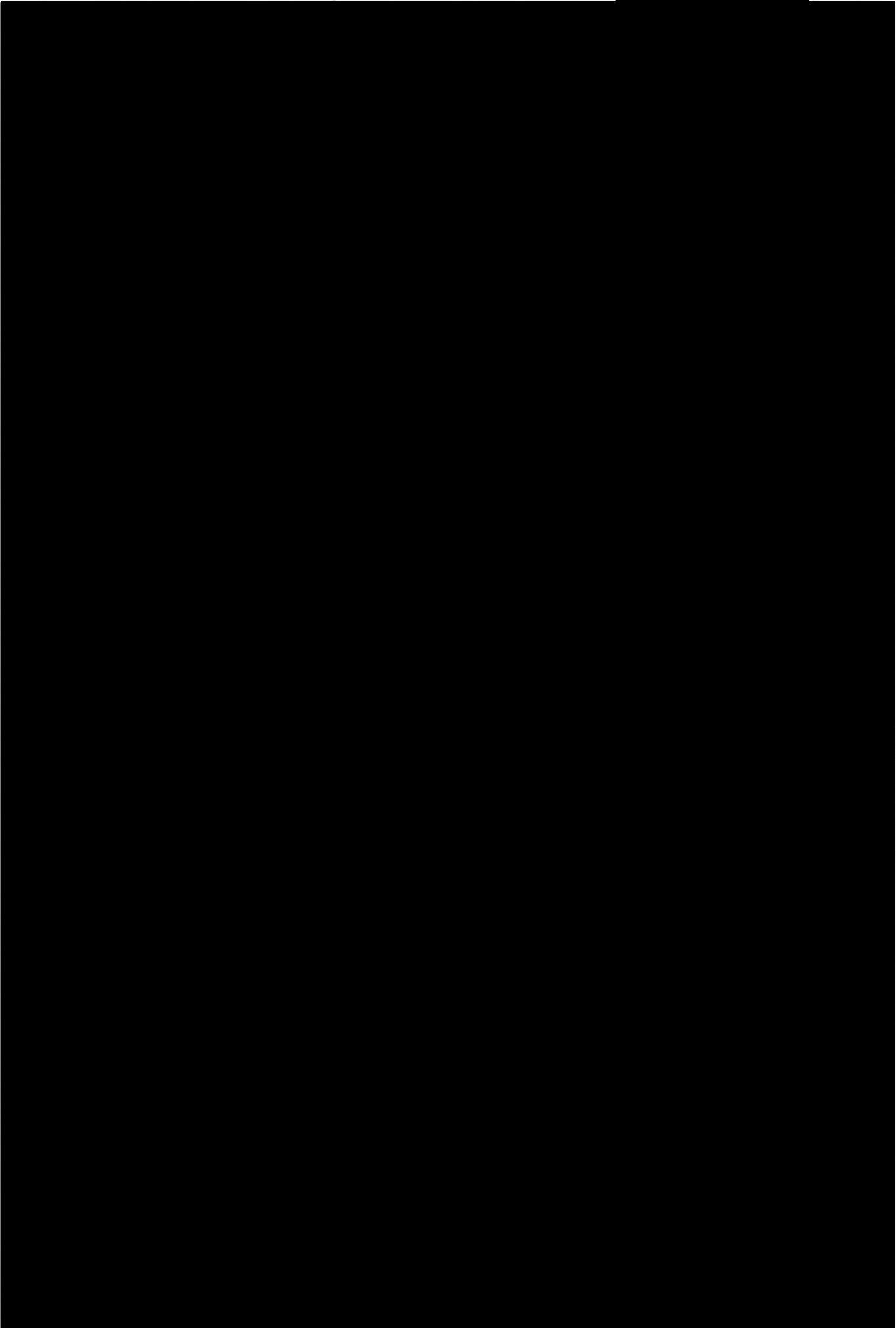
United States v. Hamdan

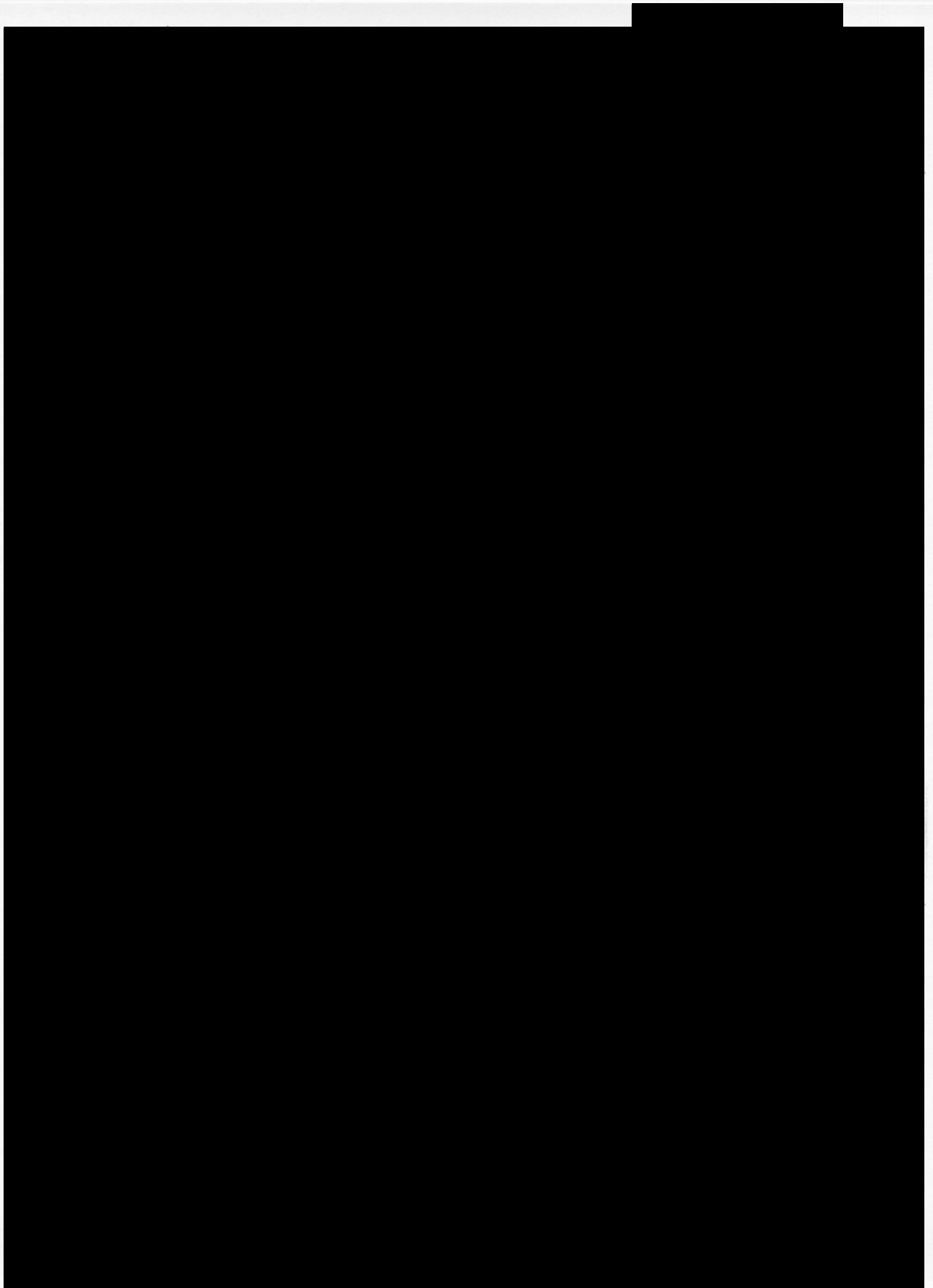
*The Government is providing this proposal for motion and trial schedule pursuant to CAPT Allred's order.

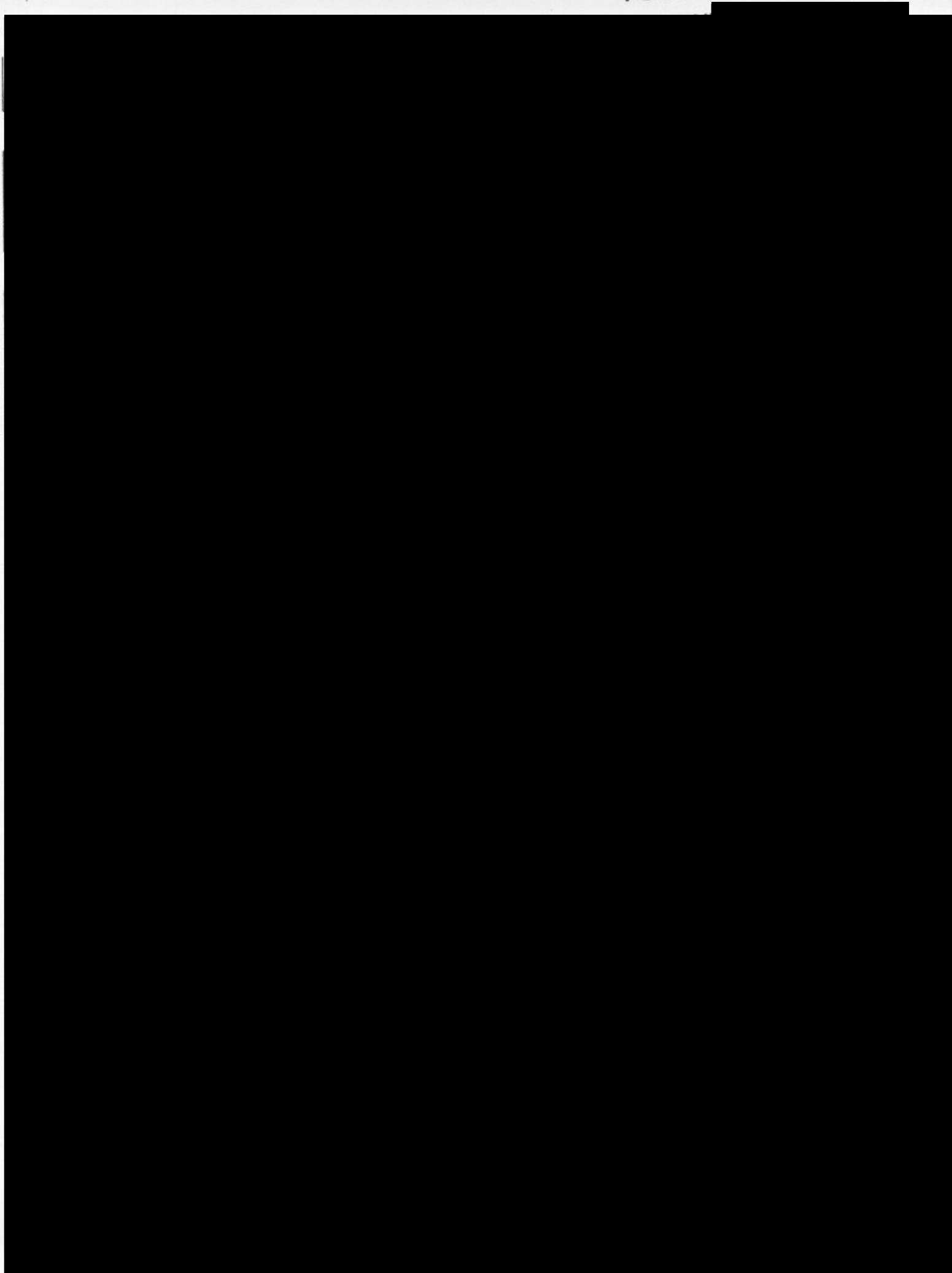
#	Event	Date	
1.	Jurisdictional Hearing	5 Dec 07 (?)	
2.	"Law" Motions: <i>Motion</i> ¹	2 Jan 08	
3.	"Law" Motions: <i>Response</i>	16 Jan 08	
4.	"Law" Motions: <i>Reply</i>	23 Jan 08	
5.	Evidentiary motions: <i>Motion</i>	30 Jan 08	
6.	Evidentiary motions: <i>Response</i>	13 Feb 08	
7.	Evidentiary motions: <i>Reply</i>	20 Feb 08	
8.	Defense Witness requests for evidentiary motions, trial, and sentencing ²	2 Jan 08	
9.	Prosecution Response to Witness Requests	9 Jan 08	
10.	Prosecution notice for use of hearsay	9 Jan 08	Formatted: Bullets and Numbering
11.	Defense Motion to Produce Witness for Evidentiary Motions, trial, and sentencing	30 Jan 08	Formatted: Bullets and Numbering
12.	Prosecution Response to Defense Motion to Produce Witness for Evid. Motion	10 Feb 08	Formatted: Bullets and Numbering
13.	Motions Hearings: "Law Motions" & "Evidentiary motions"	23 Feb 08	Formatted: Bullets and Numbering
15	Voir dire of members	1 Mar 08	Formatted: Bullets and Numbering
16.	Trial	1 Mar 08	Formatted: Bullets and Numbering

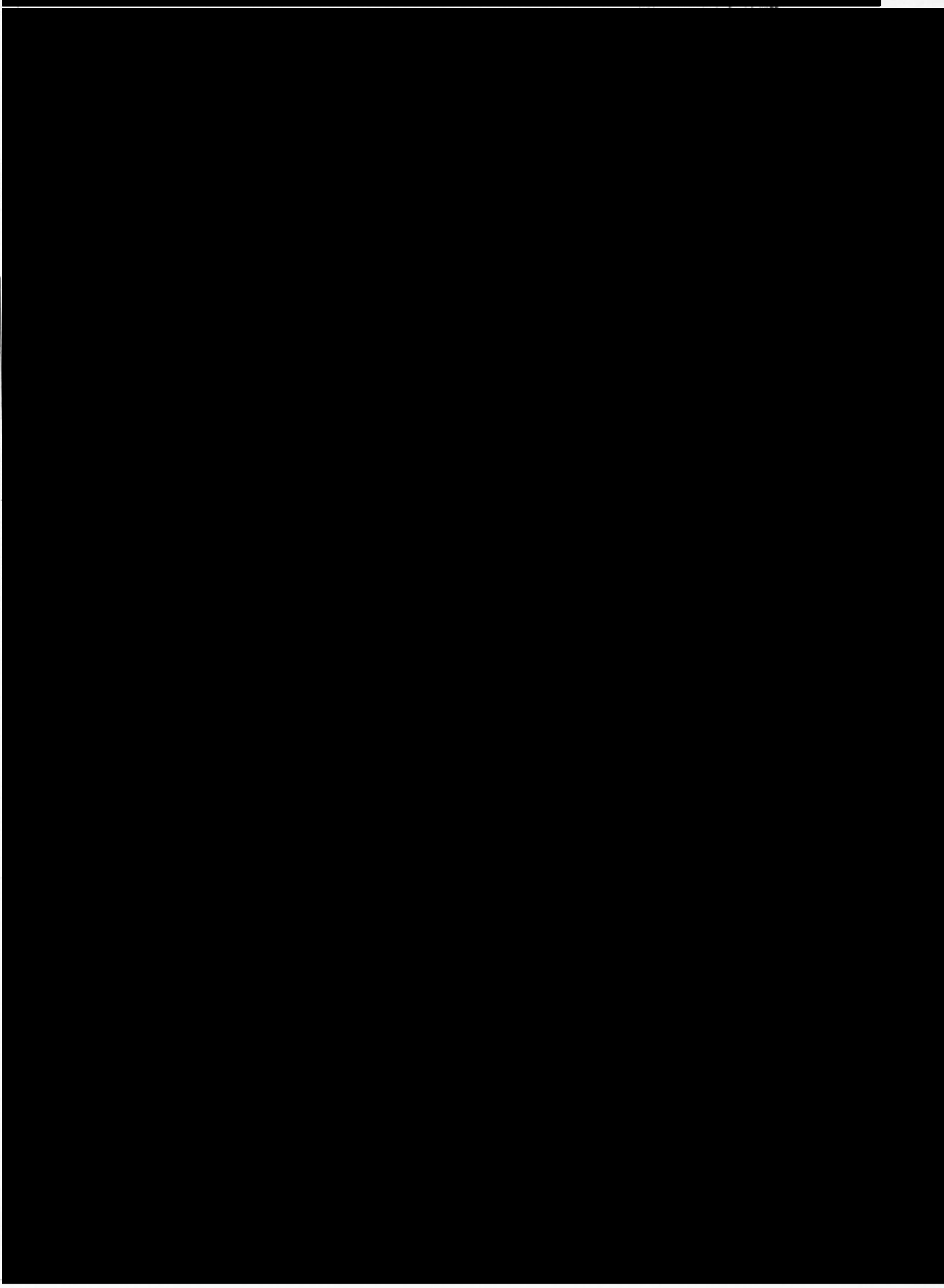
¹ A "law motion" is any motion except that to suppress evidence or address another evidentiary matter.

² Defense must concurrently notify the Office of the Convening Authority sufficiently in advance and provide all required information to enable the Office of the Convening Authority to arrange for transportation of the requested witnesses to Guantanamo Bay.









[The following text is a dense, handwritten manuscript, likely a letter or a page from a book. It is written in a cursive script and is mostly illegible due to the quality of the scan. The text appears to be a continuous paragraph or a series of connected sentences. The handwriting is somewhat slanted and the ink is dark. There are some visible ink blots and the paper has a slightly aged appearance. The text is written in a single column, filling most of the page area.]

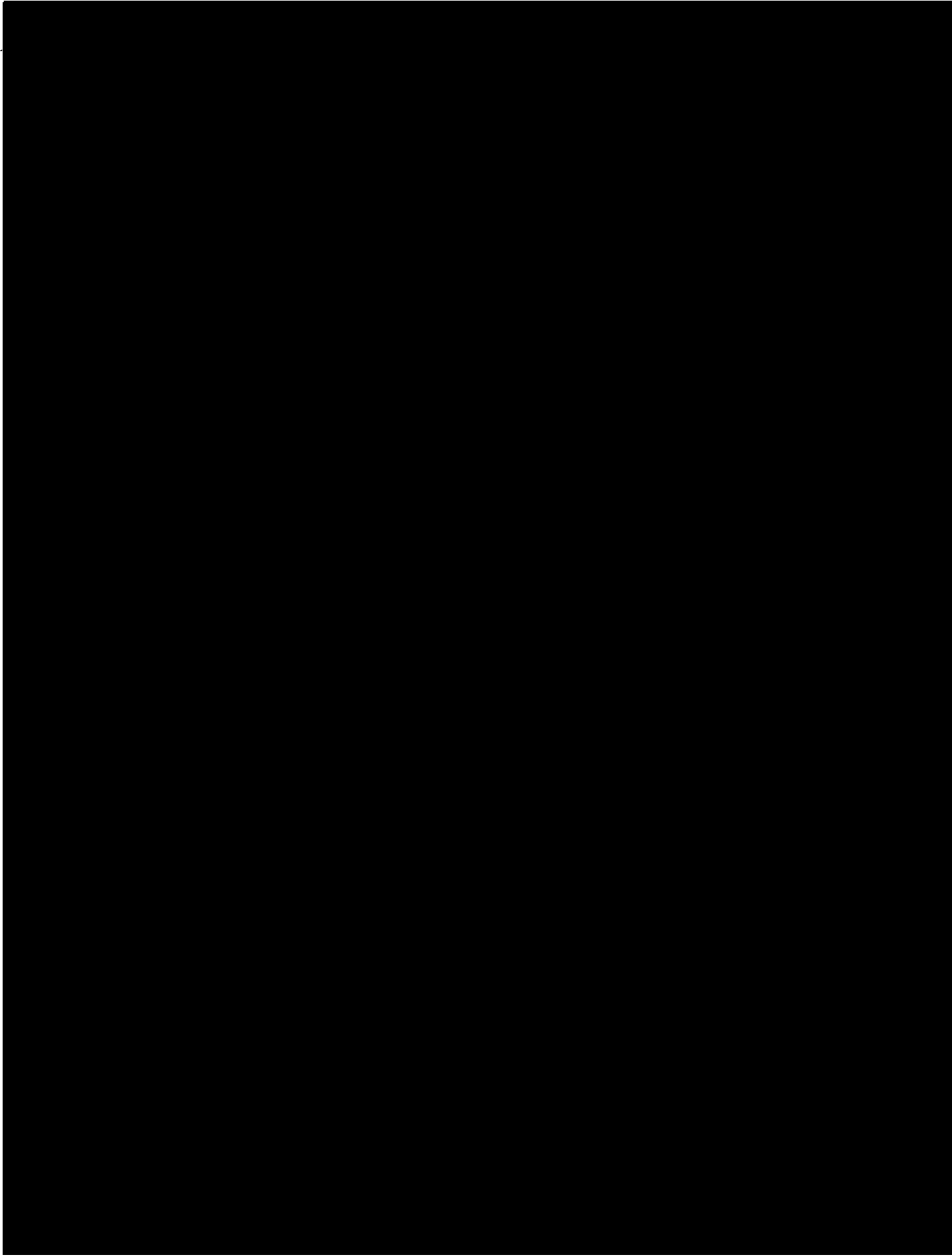
Date of transcription 11/14/2002

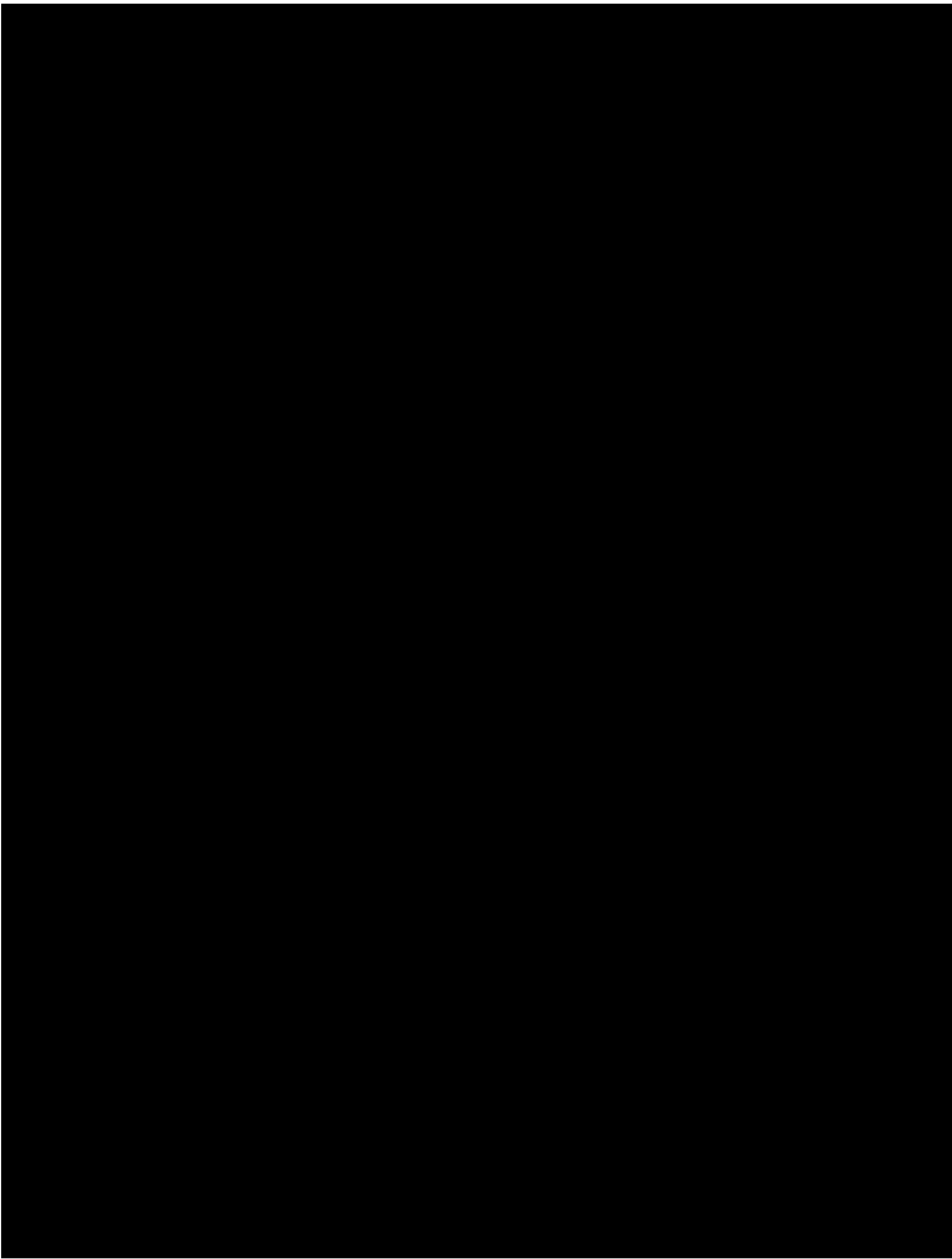
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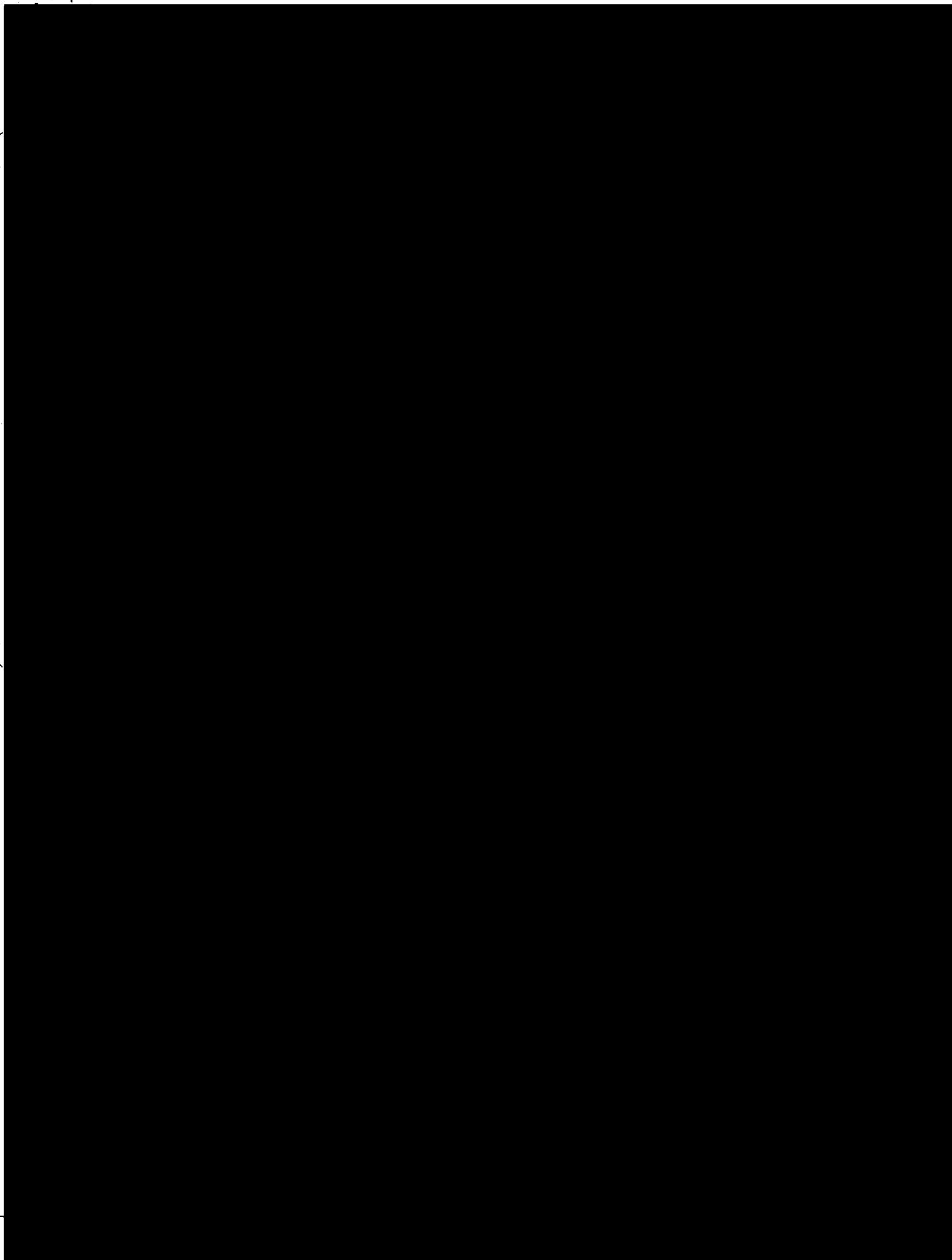
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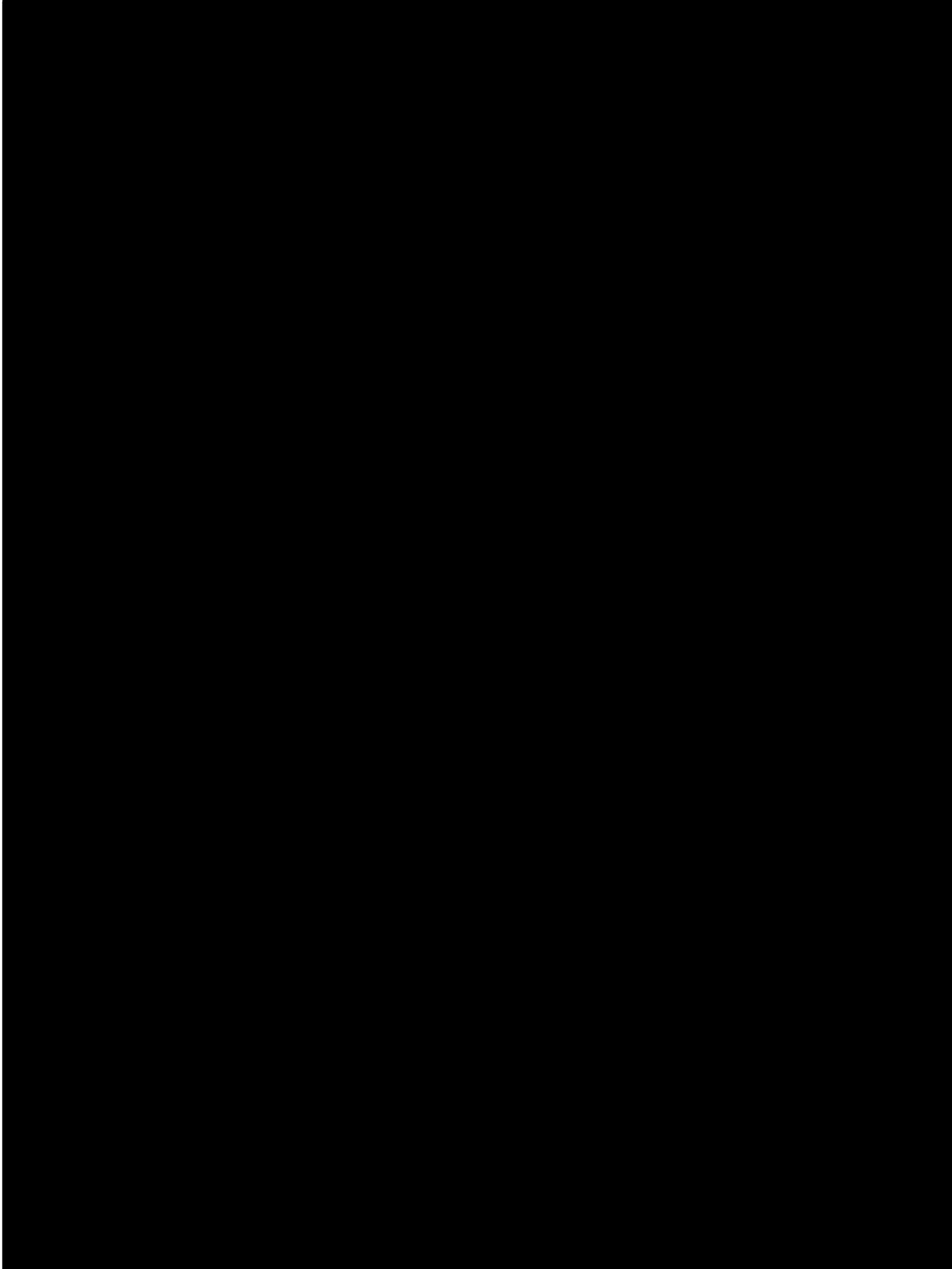
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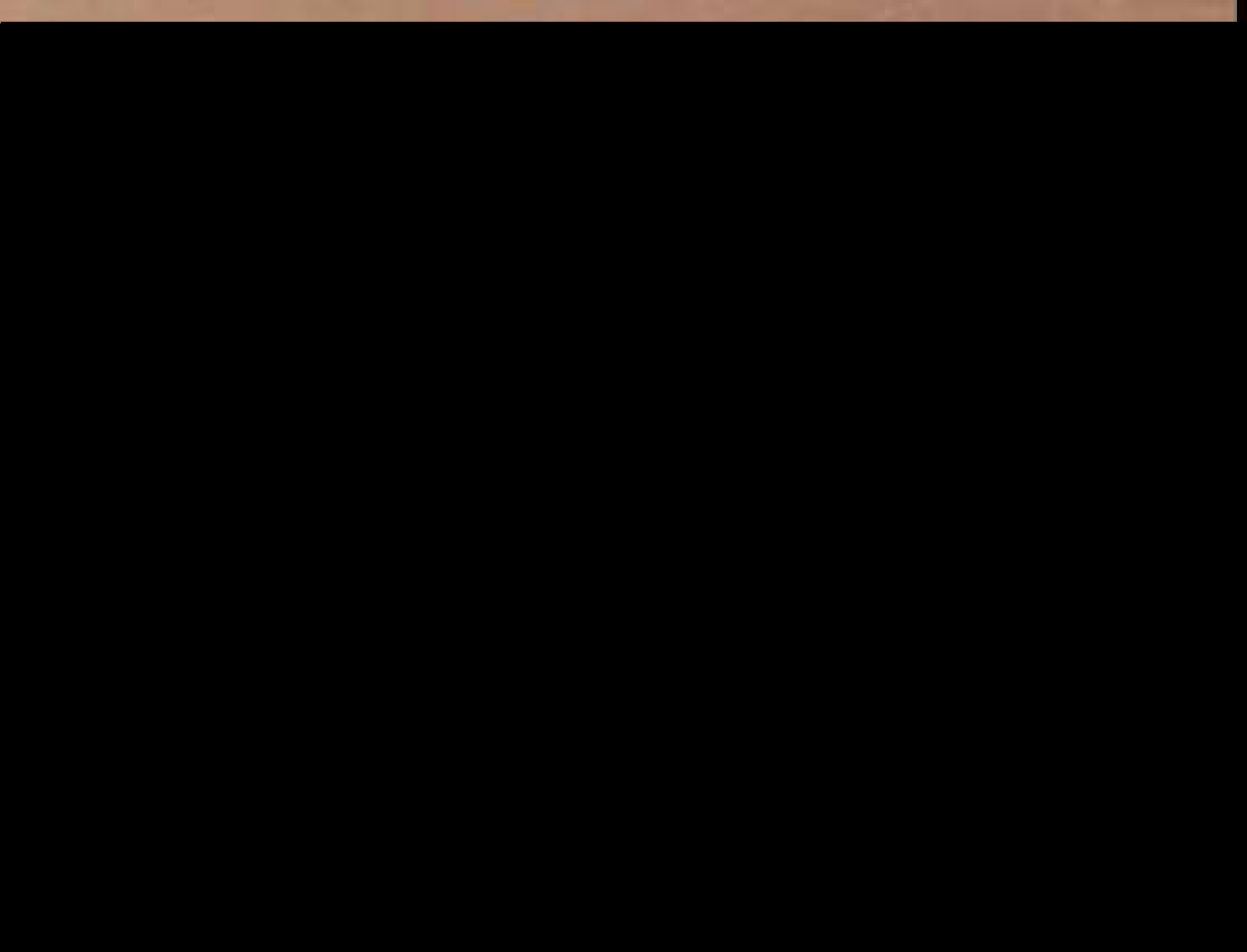
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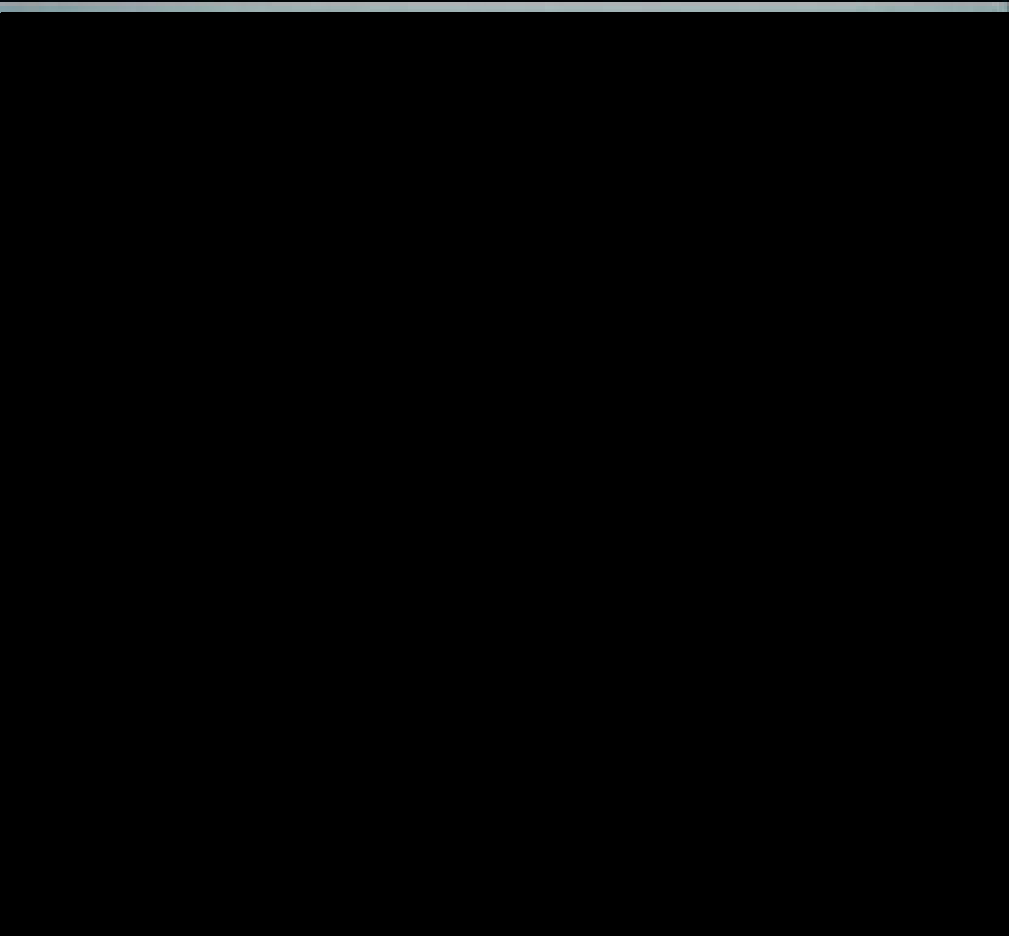
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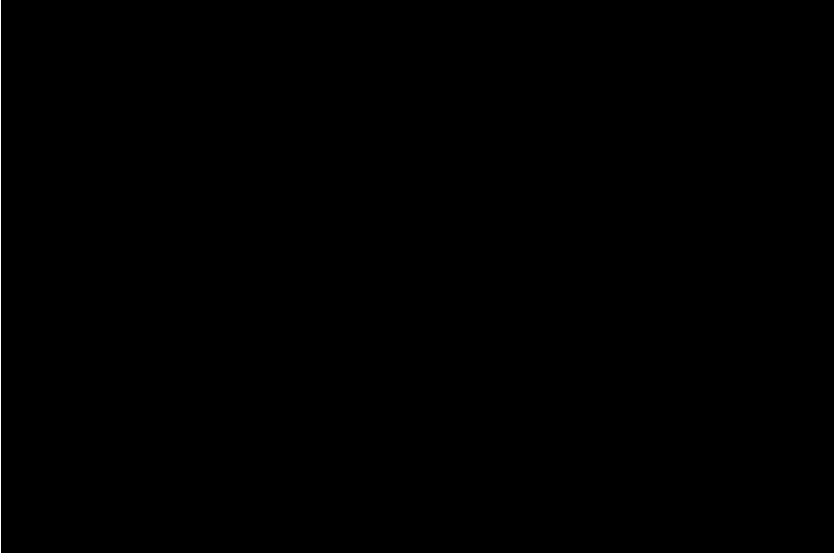
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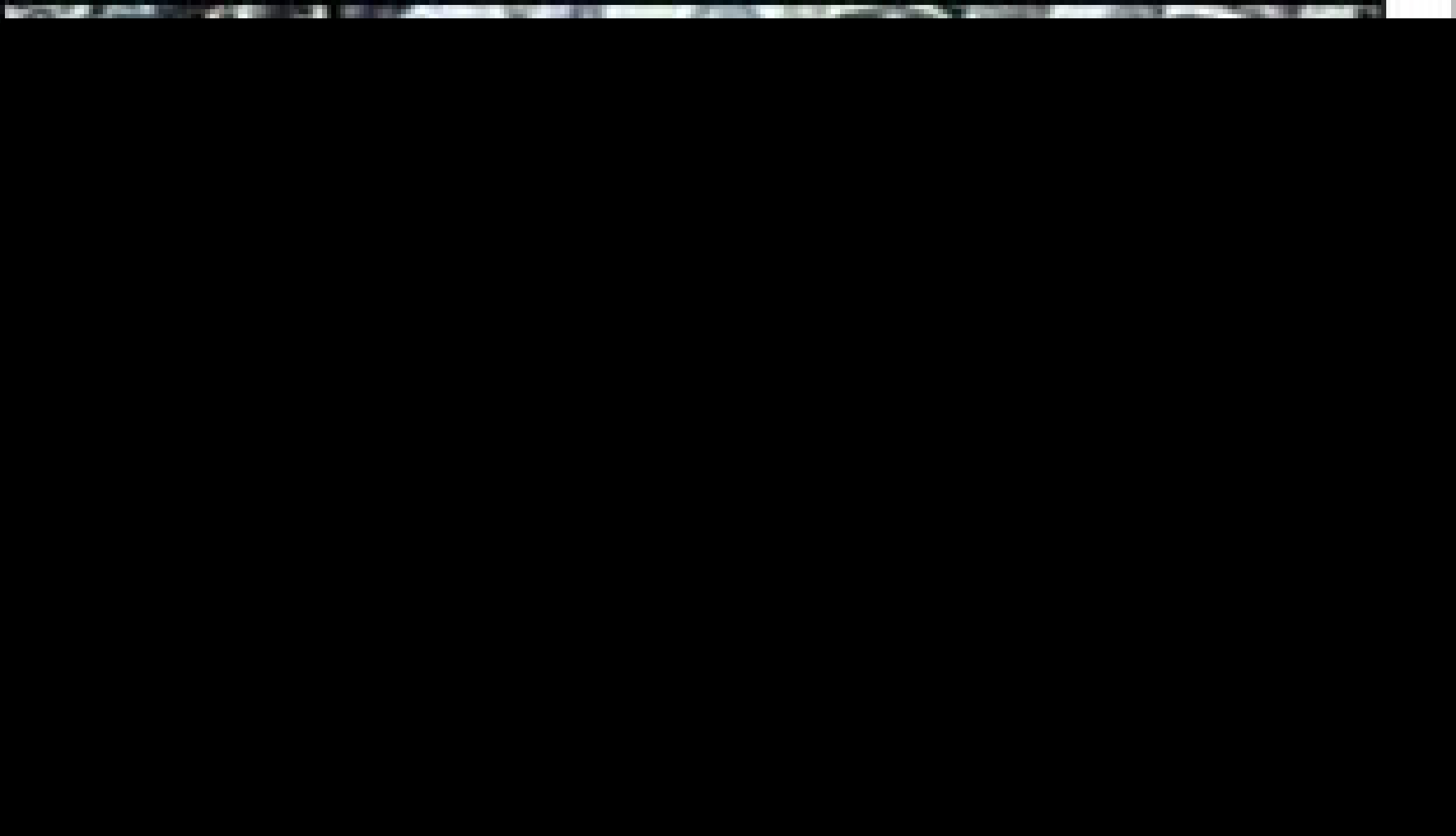
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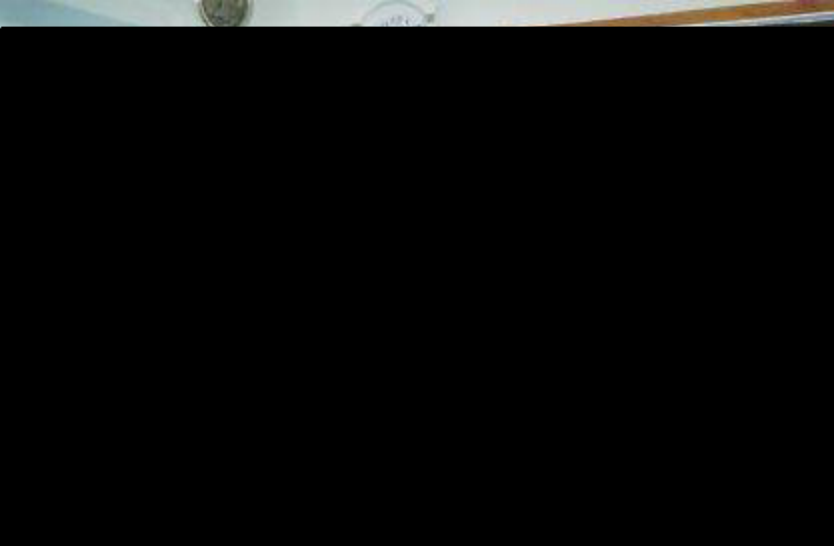


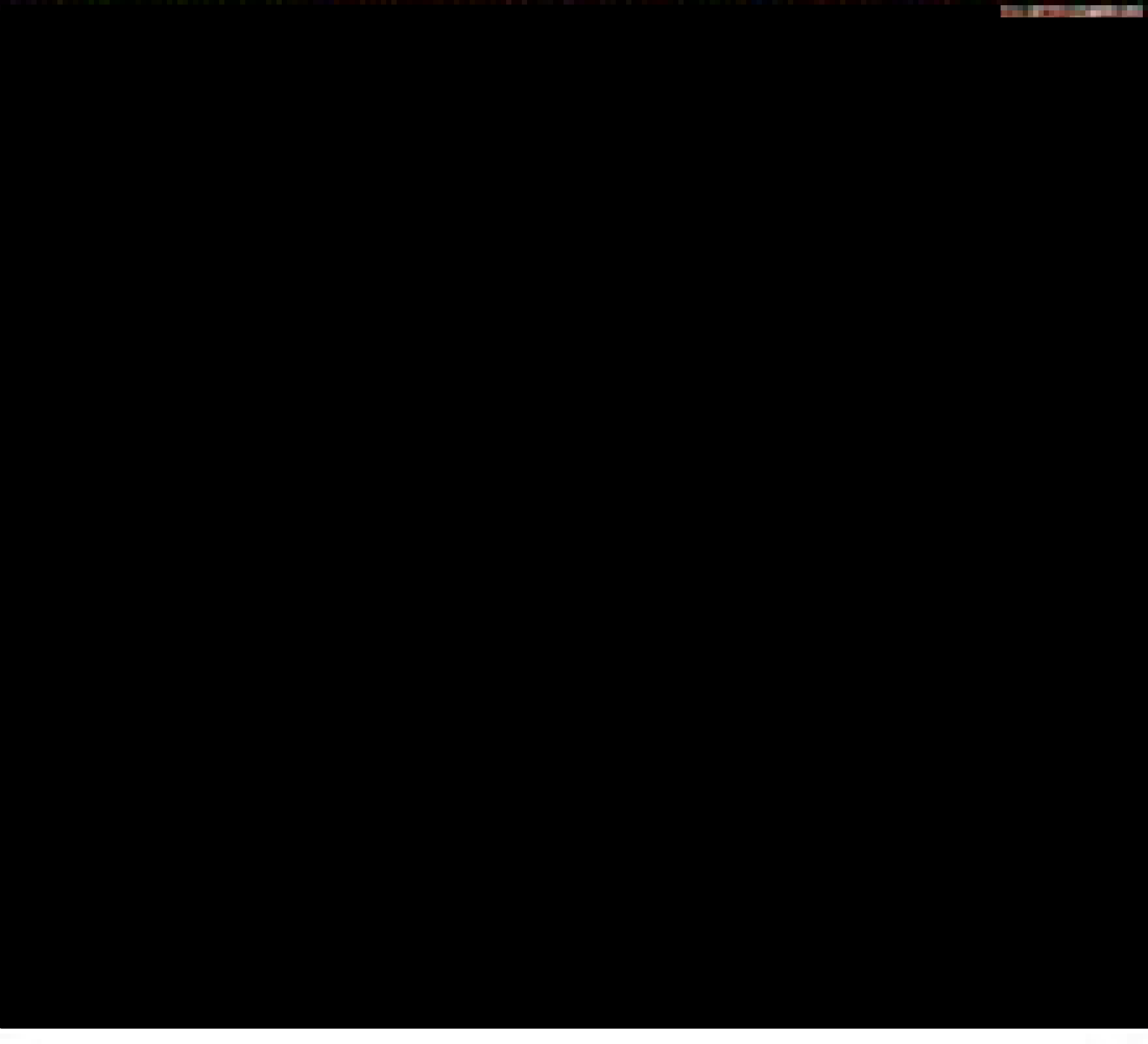












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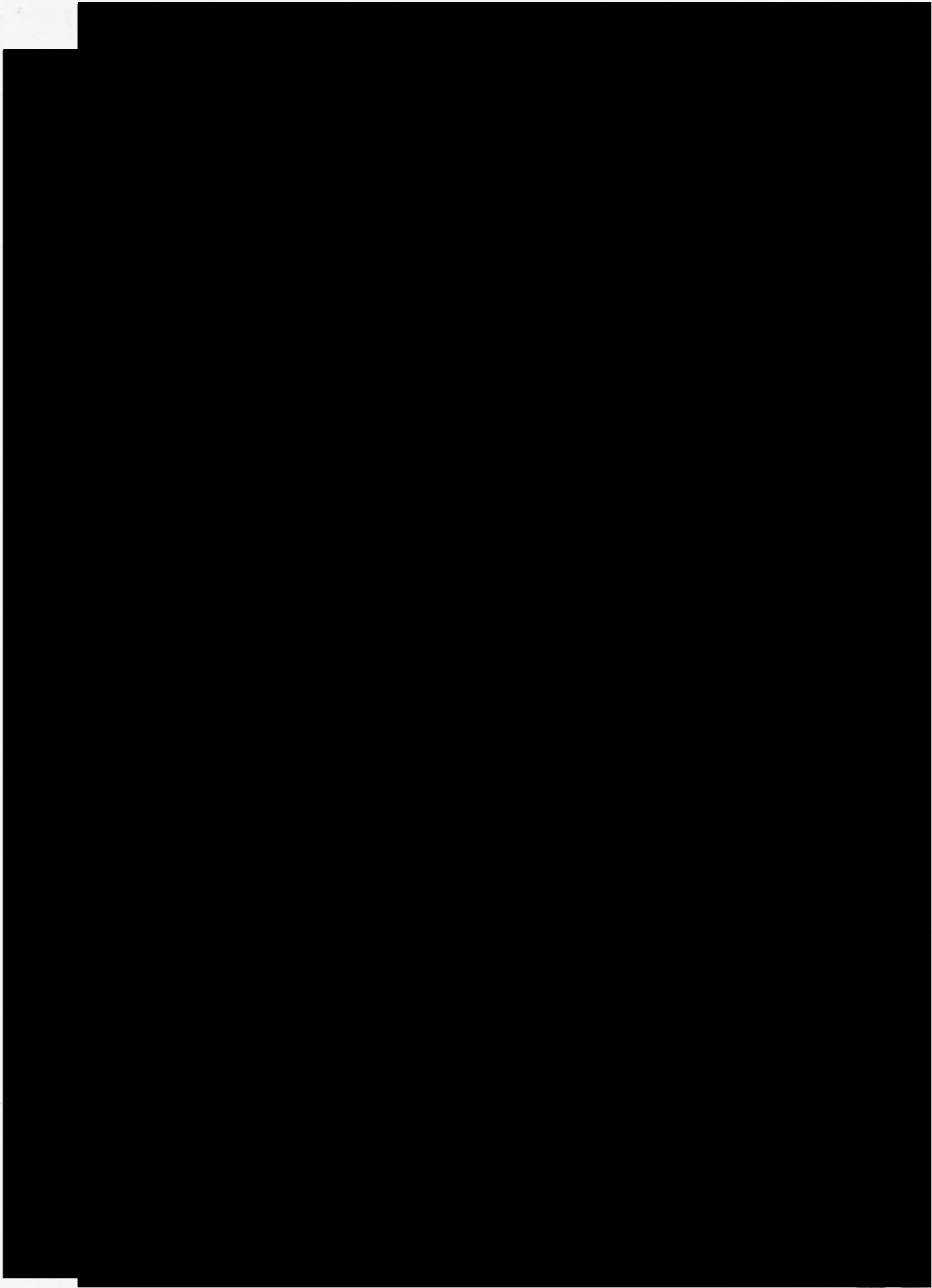
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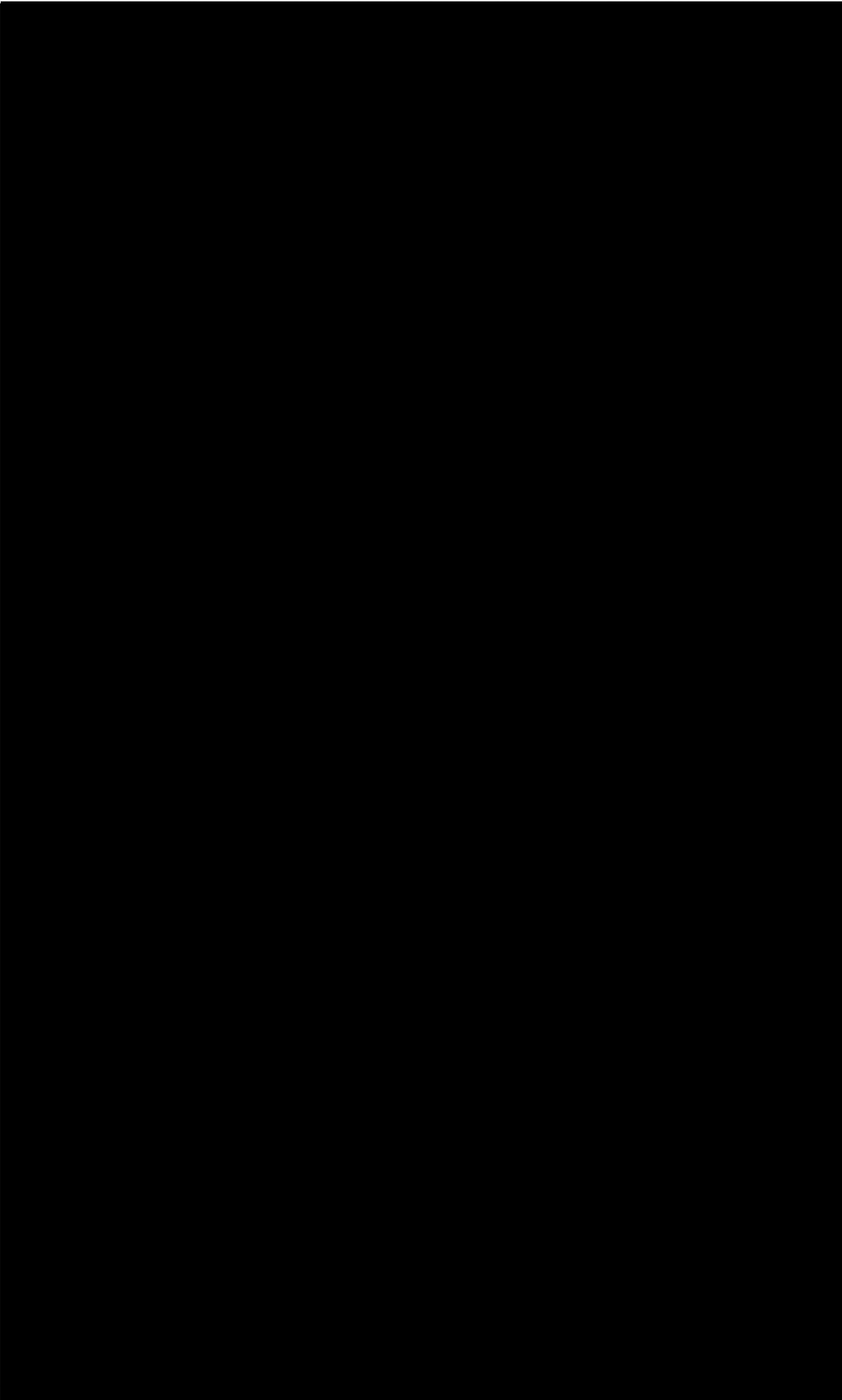
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From: Prasow, Andrea CIV USSOUTHCOM JTFGTMO
Sent: [REDACTED]
Cc: Mizer, Brian L LT USSOUTHCOM JTFGTMO; [REDACTED] USSOUTHCOM JTFGTMO; David, Steven H COL USSOUTHCOM JTFGTMO; Berrigan, Michael CIV USSOUTHCOM JTFGTMO; Britt, William B LTC USSOUTHCOM JTFGTMO; Stone, Timothy D LCDR USSOUTHCOM JTFGTMO; Gibbs, Rudolph TSgt USSOUTHCOM JTFGTMO; Morris, Lawrence J COL USSOUTHCOM JTFGTMO; [REDACTED] m';
Subject: U.S. v. Hamdan - Defense Motion to Compel Access to Potential Witnesses
Attachments: Defense Motion to Compel Access to Potential Defense Witnesses.pdf; Defense Motion to Compel Access to Potential Defense Witnesses.doc



Defense Motion to Compel Acces... Defense Motion to Compel Acces...

LTC [REDACTED]

Attached for filing in the case of United States v. Hamdan please find Defense Motion to Compel Access to Potential Defense Witnesses. The PDF version is signed and includes attachments. The Word version is unsigned and does not include attachments.

Respectfully submitted,

AJP

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

Defense Motion
to Compel Access to Potential Defense
Witnesses

4 December 2007

1. **Timeliness:** This motion is filed within the timeframe established by the Military Commissions Trial Judiciary Rules of Court.
2. **Relief Sought:** Defendant Salim Ahmed Hamdan moves for an Order compelling the Prosecution to produce for examination five detainees who the Defense has identified as potentially possessing relevant and material information, or, alternatively, abatement of these proceedings until such time as access to the potential witnesses has been granted.
3. **Overview:** Salim Hamdan was captured in Afghanistan on November 24, 2001. He was allegedly captured with one other man who is currently in the custody of the United States and detained at Guantanamo Bay, Cuba. The Government alleges, *inter alia*, that Mr. Hamdan was a member of al Qaeda. Also in United States custody at Guantanamo Bay, Cuba, are four detainees who the Government has identified as high-ranking al Qaeda operatives. In order to prepare for the jurisdictional hearing scheduled to commence on December 5, 2007, the Defense requested interviews with the detainee allegedly captured at the same time as Mr. Hamdan as well as with the allegedly high-ranking al Qaeda operatives. The Defense request for access to witnesses was unreasonably denied by the Prosecution in violation of its obligations under R.M.C. 701(j). Accordingly, the Defense moves for an Order from the commission to compel the Prosecution to facilitate interviews by the Defense of the potential witnesses for Mr. Hamdan in advance of the jurisdictional hearing. Alternatively, the proceedings should be abated until

such time as the Prosecution grants access to the potential witnesses.

4. Burden and Standard of Proof: The Defense as the moving party bears the burden of establishing by a preponderance of the evidence that it is entitled to the requested relief.

5. Facts:

- A. On November 15, 2007, the Defense sent a request by electronic mail to the Prosecution for assistance in securing the opportunity to interview five potential defense witnesses in order to adequately prepare a request under R.M.C. 703(c)(2)(B)(i). The Defense requested interviews with five detainees currently in the custody of the United States and detained at Guantanamo: Khalid Shaykh Muhammad, Ramzi Bin al-Shib, Abu Faraj al Libi, Said Boujaadia and Abdul Rahim al-Sharqawi. (Attachment A.)
- B. On November 20, 2007, having failed to receive a response, the Defense reiterated its request, noting that the military judge had ordered the Defense to provide its request for production of witnesses by November 28, 2007. (Attachment B.)
- C. On November 20, 2007, the Prosecution responded by requesting information required by R.M.C. 703(c)(2)(B)(i). (Attachment C.)
- D. On November 21, 2007, the Defense sent a memorandum to the Prosecution informing it that a request for access to potential witnesses is governed by R.M.C. 701(j), and provided additional information as to the relevance of the requested interviews. (Attachment D.)
- E. On November 28, 2007, the Defense provided a list of proposed witnesses to the commission and the Prosecution and submitted a request for production of witnesses pursuant to R.M.C. 703. (Attachments E, F.) The Defense request provided as much detail as was possible without the prior interviews of the five detainees.

6. Law and Argument:

APPLICABLE LAW PROVIDES THE DEFENSE WITH EQUAL ACCESS TO EVIDENCE AND WITNESSES

Rule for Military Commission 701(j) (*Access to witnesses and evidence.*) provides that “Each party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence.” This rule is similarly found in the

Military Commissions Act and the Regulation for Trial by Military Commissions.¹ To the best of the Defense's knowledge, information and belief, prior to permitting an interview of a detainee by defense counsel, other than counsel's own client, the Joint Task Force Commander requires permission from the Prosecution. Accordingly, a request by the Defense to the Prosecution for assistance in facilitating the requested interviews is the only way the Defense can

¹ 10 U.S.C. § 949j(a) ("RIGHT OF DEFENSE COUNSEL – Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense."; Regulation for Trial by Military Commissions 17-2(a) ("Pursuant to 10 U.S.C. § 949j, the defense counsel in a military commission shall have a reasonable opportunity to obtain witnesses and other evidence as provided by R.M.C. 701-703, and Mil. Comm. R. Evid. 505.")

In addition, the law of war also requires Mr. Hamdan to be accorded access to witnesses, as requested. The Supreme Court held in *Hamdan v. Rumsfeld* that Common Article 3 of the Geneva Conventions of 1949 applies to the detention and prosecution of Mr. Hamdan. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795 (2006). Common Article 3 requires that criminal proceedings be carried out only "by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

The judicial safeguards required by Common Article 3 are delineated in article 75 of Protocol I to the Geneva Conventions of 1949. Article 75 (4)(g) provides that, "anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf *under the same conditions as witnesses against him.*" Article 75 has been explicitly recognized and endorsed by the United States as customary international law. See Michael J. Matheson, The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, Remarks before Session One of the Humanitarian Law Conference (Fall 1987), in 2 AM. U. J. INT'L L. & POL'Y 419, 427 (1987). See also, Major P.A. Seymour, USMC, Memorandum on Protocol I as an Expression of Customary International Law in International and Operational Law Dept., The Judge Advocate General's School, U.S. Army, LAW OF WAR DOCUMENTARY SUPPLEMENT at 373.

The right to access witnesses is articulated, further, in article 105 of GPW, which provides that defense counsel may "confer with any witnesses for the defense, including prisoners of war." Of particular relevance for the current proceedings, the official commentary to article 105 observes that, "during the Second World War, in many cases the lack of necessary permits for visiting prisoners of war in camp and interviewing witnesses hampered the advocate in his work; the new text puts this situation right." Official Commentary to Art. 105, para. 3 (C).

The foregoing guarantees apply to any detainee subject to criminal proceedings, regardless of status as a POW or unlawful combatant. That much is clear on the face of common article 3 and article 75. The applicability of article 105 to all detainees, regardless of combatant status, is stated explicitly in article 129 of GPW, which concerns war crimes prosecutions. Article 129 provides that: "*In all circumstances, the accused persons shall benefit by safeguards of proper trial and defense, which shall not be less favourable than those provided by Article 105....*"

Mr. Hamdan, in any event, is currently entitled to all rights attending POW status. Unless and until he is determined by a competent tribunal to be an unlawful combatant, he is entitled to POW treatment. See Geneva III art. 5; Proto I art 45(1); Field Manual art. 71; Operational Law Handbook XII (B)(2).

communicate with potential detainee-witnesses. The Prosecution's request that the Defense provide a summary as contemplated by R.M.C. 703 is inappropriate in this context. The Defense is not able to provide a synopsis of the expected testimony of a potential witness without first having access to that potential witness to determine what he might say – the very reason the Defense requested the interviews in the first place. The Prosecution's continued refusal to provide any access to the potential witnesses, which includes a refusal to produce them at the evidentiary hearing, is entirely improper. The Defense has amply demonstrated that its request is reasonable and the Prosecution is under legal obligation to facilitate Defense access to potential witnesses and evidence.

THE DEFENSE REQUEST TO INTERVIEW POTENTIAL WITNESSES WAS REASONABLE

The Defense has challenged the military commission's exercise of *in personam* jurisdiction over Mr. Hamdan. The purpose of the evidentiary hearing scheduled for December 5, 2007, is for the Government to seek to demonstrate that Mr. Hamdan is an alien unlawful enemy combatant within the meaning of the Military Commissions Act, and also to demonstrate that the military commission otherwise has lawful jurisdiction over Mr. Hamdan. Mr. Hamdan's charge sheet explicitly alleges that he entered into a conspiracy with Osama bin Laden and other members of al Qaeda and that Mr. Hamdan joined the organization known as al Qaeda. Charge Sheet at 3. It further alleges that he materially supported terrorism by, *inter alia*, joining the organization known as al Qaeda. Charge Sheet at 4, 5. The Defense request to interview potential witnesses, who may have relevant, material and/or exculpatory information, is entirely reasonable and indeed, essential in order for the Defense to adequately prepare for the evidentiary hearing and for trial.

Interview of Detainee Captured with Mr. Hamdan

The Defense requested to interview a detainee named Said Boujaadia. The Government alleges that Mr. Boujaadia and Mr. Hamdan were captured together in Afghanistan on November 24, 2001. Mr. Boujaadia, therefore, likely has direct knowledge of the circumstances relating to Mr. Hamdan's capture and any possible act made by Mr. Hamdan immediately prior to capture. The Defense previously interviewed Mr. Boujaadia in 2004 (during which time Mr. Hamdan had been charged under an unlawful military commission system with the alleged crime of conspiracy to violate the laws of war). At the time of that interview, the question of whether Mr. Hamdan was a lawful combatant and charges related to surface-to-air missiles were not at issue. The Defense accordingly requested an additional interview in advance of the December 5 hearing. If those facts were not sufficient, the Prosecution itself has submitted a transcript of Mr. Boujaadia's interrogation to the commission as evidence upon which it intends to rely for the evidentiary hearing. *See* E-mail from LCDR Stone, "Prosecution witness production," November 28, 2007. In the face of the Prosecution's own intention to introduce evidence obtained by Mr. Boujaadia at the evidentiary hearing, the Prosecution has no basis for refusing to produce Mr. Boujaadia for a pre-hearing interview.

Further, on December 3, 2007, the Defense became aware that the Government had in its possession evidence that Mr. Boujaadia potentially possessed exculpatory information. *See* Unclassified Summary of Evidence for Administrative Review Board in the Case of Boujaadia, Said, September 6, 2006 (Attachment G) (indicating that indigenous forces "took possession of two SA-7 missiles and an ICOM hand-held radio from the Arabs killed in the gunfight[.]" that occurred at the time of Mr. Hamdan's and Mr. Boujaadia's capture.) The Prosecution is under an obligation to disclose "the existence of any evidence known to trial counsel that reasonably

tends to exculpate the accused.” 10 U.S.C. § 949j(d); *see also* R.M.C. 701(e). In light of the Prosecution’s failure to produce potentially exculpatory information in the possession of the Government, the need for Defense access to interview potential witnesses is even greater.

Interviews of Other Alleged al Qaeda Operatives

The Defense also requested the interviews of four other persons in the custody of the United States and detained at Guantanamo Bay, Cuba. The Government has alleged that Khalid Shaykh Muhammad, Ramzi Bin al-Shib, Abu Faraj al Libi and Abdul Rahim al-Sharqawi are or were al Qaeda leaders and operatives. Each is likely to be in a position to know whether Mr. Hamdan was a member of al Qaeda, whether he was a combatant and whether Mr. Hamdan participated in the planning and execution of acts that allegedly violated the law of war. This information is highly relevant and material to the commission’s assessment of whether Mr. Hamdan is an unlawful enemy combatant within the meaning of the MCA. Included in the evidence the Government intends to introduce at the evidentiary hearing are documents associated with al Qaeda, such as *fatwas* and the 1996 “Declaration of Holy War Against Americans Who are Occupying the Land of the Two Holy Places.” *See* Hamdan Jurisdictional Hearing Documents, attached to E-mail from LCDR Stone, November 28, 2007. Mr. Hamdan’s alleged knowledge of and participation in al Qaeda is absolutely central to the evidentiary hearing and to the charges themselves. The Defense request to interview witnesses who very likely possess information relevant to those allegations is completely reasonable. Without access to those witnesses, the Defense is denied the opportunity to adequately confront the allegations against Mr. Hamdan.

**REFUSAL TO GRANT INTERVIEWS OF POTENTIAL WITNESSES
CONSTITUTES AN UNREASONABLE IMPEDIMENT TO THE DEFENSE'S
ACCESS TO WITNESSES AND EVIDENCE**

The Prosecution is under a legal obligation pursuant to R.M.C. 701(j) to not unreasonably impede the Defense's access to witnesses and evidence. The Prosecution has failed to provide any response to the Defense's request for interviews in advance of a request for production of witnesses. Indeed, the Prosecution has refused to produce the witnesses at all. As the Prosecution effectively controls the Defense access to detainees other than the accused, its refusal to make them available is a significant impediment to the Defense's ability to prepare its case. The Prosecution has utterly failed to provide any justification for hampering the Defense's preparation of its case. In the absence of justification, the commission should infer unreasonableness.

Even if the Prosecution had provided justification for its refusal to grant access to witnesses, any purported justification would be unreasonable. The potential witnesses likely have material and relevant evidence relating to Mr. Hamdan's defense, and at least one witness may possess exculpatory evidence. "Relevant evidence [is] that which has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (citing Military Rule of Evidence 401). Each potential witness might well possess information regarding Mr. Hamdan's alleged membership in al Qaeda and his alleged participation in unlawful activities. It is difficult to conceive of any reasonable justification for the Prosecution's refusal to allow the Defense to adequately prepare its case.

The unreasonable impediment imposed on the Defense by the Prosecution's refusal to make potential witnesses available has caused the Defense significant hardship in its attempt to adequately prepare for the December 5 hearing. Accordingly, the commission should compel the

Government to make the potential witnesses available for interview by the Defense as soon as practicable, and should abate the proceedings until such time as the Defense has had the opportunity to interview the witnesses and to amend its request for production of witnesses if necessary.

7. **Request for Oral Argument:** The Defense does not request oral argument on the issues raised in this motion.

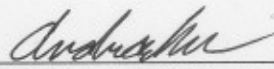
8. **Request for Witnesses:** As the Defense does not request oral argument, the Defense does not intend to call witnesses in connection with this motion, but reserves the right to do so if oral argument is scheduled and the Prosecution's response raises issues requiring rebuttal testimony.

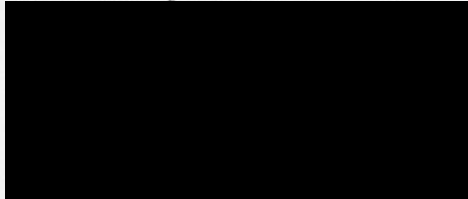
9. **Conference with Opposing Counsel:** The Defense has conferred with the Prosecution, who opposes the requested relief.

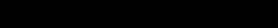
10. List of Attachments:

- A. E-mail from Andrea Prasow to LTC Britt and LCDR Stone, November 15, 2007.
- B. E-mail from Andrea Prasow to LTC and LCDR Stone, November 20, 2007.
- C. E-mail from LTC Britt to Andrea Prasow, November 20, 2007.
- D. Memorandum from Professor Charles Swift to LTC Britt, November 21, 2007.
- E. Defense Witness List, November 28, 2007.
- F. Defense Request for Production of Witnesses, November 28, 2007.
- G. Unclassified Summary of Evidence for Administrative Review Board in the Case of Boujaadia, Said, September 6, 2006.

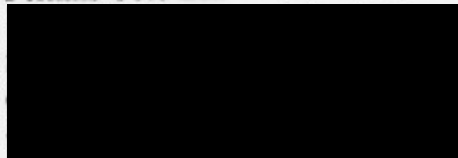
Respectfully submitted,

By: 
LT BRIAN L. MIZER, JAGC, USN
Detailed Defense Counsel
ANDREA J. PRASOW
Assistant Defense Counsel



PROF. CHARLES SWIFT
Emory School of Law

Civilian Defense Counsel

HARRY H. SCHNEIDER, JR.
JOSEPH M. MCMILLAN
Perkins Coie LLP



Attachment A

From: Prasow, Andrea, Ms, DoD OGC
Sent: Thursday, November 29, 2007 6:28 PM
To: [REDACTED]
Subject: FW: US v. Hamdan - Request

for Interviews

Gentlemen,

As you know, the list of witnesses and evidence upon which we intend to rely for the December 5 hearing is due on 28 November. In order to determine whether we will call certain people as witnesses, we need the opportunity to interview them in advance. Accordingly, we request your assistance in securing the opportunity to interview the following persons for the limited purpose of preparing for the December 5 hearing. We do not waive the opportunity to seek additional interviews with them to prepare for trial.

Khalid Shaykh Muhammad,

Ramzi Bin al-Shib,

Abu Faraj al Libi,

Said Boujaadia,

Abdul Rahim al-Sharqawi

Please let us know what additional information you might require from us in order to schedule these interviews.

Thank you,
AJP

Andrea J. Prasow

unsel

Attachment B

[REDACTED]

From: Prasow, Andrea, Ms, DoD OGC [REDACTED]
Sent: Thursday, November 29, 2007 6:28 PM
To: [REDACTED]
FW: US v. Hamdan - Request for Interviews
Signed By: [REDACTED]

From: Prasow, Andrea, Ms, DoD OGC
Sent: Tuesday, November 20, 2007 09:42
To: Britt, William, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC
Cc: Mizer, Brian, LT, DoD OGC
Subject: FW: US v. Hamdan - Request for Interviews

Gentlemen,

As travel may be difficult with the upcoming holiday, please confirm if you will be facilitating these witness interviews in advance of the 28 November deadline to disclose the identity of witnesses and to provide the commission with a synopsis of the expected testimony.

Thank you,
AJP

From: Prasow, Andrea, Ms, DoD OGC
Sent: Thursday, November 15, 2007 14:36
To: Britt, William, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC
Cc: Mizer, Brian, LT, DoD OGC
Subject: US v. Hamdan - Request for Interviews

Gentlemen,

As you know, the list of witnesses and evidence upon which we intend to rely for the December 5 hearing is due on 28 November. In order to determine whether we will call certain people as witnesses, we need the opportunity to interview them in advance. Accordingly, we request your assistance in securing the opportunity to interview the following persons for the limited purpose of preparing for the December 5 hearing. We do not waive the opportunity to seek additional interviews with them to prepare for trial.

Khalid Shaykh Muhammad, [REDACTED]

Ramzi Bin al-[REDACTED]

Abu Faraj al Libi, [REDACTED]

Said Boujaadia, [REDACTED]

Abdul Rahim al-Sharqawi

Please let us know what additional information you might require from us in order to schedule these interviews.

Thank you,
AJP

Andrea J. Prasow
Office of the Chief Defense Counsel
Office of Military Commissions

AE 53 (Hamdan)
Page 14 of 36

Attachment C

Ms. Prasow = please provide the information required by R.C.M. =03(c)(2)(B)(i). Thank you. wbb.

WILLIAM B. BRITT

LTC, JA, USAR =BR>Deputy Chief Prosecutor
OFFICE =F MILITARY COMMISSIONS

CONFIDENTIALITY NOTICE: This electronic transmission may contain attorney work-product =r information protected under the attorney-client privilege, both of which =re protected from disclosure under the Freedom of Information Act, 5 USC =52. Do not release outside of DoD channels without prior authorization from the =sender.

=/P>

From: Prasow, Andrea, Ms, DoD OGC
Sent: Tuesday, November 20, 2007 9:42 AM
To: Britt, =William, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC
Cc: Mizer, =rian, LT, DoD OGC
Subject: FW: US v. Hamdan - Request for Interviews

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AJP

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Sent: Thursday, November 15, 2007 14:36
To: Britt, =illiam, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC
Cc: Mizer, Brian, LT, =oD OGC
Subject: US v. Hamdan - Request for Interviews

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As you know, the list of witnesses and =vidence upon which we intend to rely for the December 5 hearing is due on 28 =ovember. In order to determine whether we will call certain people as witnesses, we =eed the opportunity to interview them in advance. Accordingly, we request =our assistance in securing the opportunity to interview the following =ersons for the limited purpose of preparing for the December 5 hearing. We do =ot waive the opportunity to seek additional interviews with them to

prepare =or trial.

Khalid Shaykh Muhammad, [REDACTED]

Ramzi Bin al-Shib, [REDACTED]

Abu Faraj al Libi, [REDACTED]

Said Boujaadia, [REDACTED]

Abdul Rahim al-Sharqawi

Please let us know what additional =nformation you might require from us in order to schedule these interviews.

Thank you,
AJP

Andrea J. Prasow
Office of the Chief Defense Counsel
Office of Military Commissions

[REDACTED]

Attachment D

MEMORANDUM

November 21, 2007

From: Professor Charles Swift, Civilian Defense Counsel

To: Colonel William Britt, Military Prosecutor

Re: Prosecution Request for Information required by 703(c)(2)(B)(i) in conjunction with request to interview detainees at Guantánamo Bay

1. To the best of the Defense's knowledge and belief, prior to permitting an interview of a detainee by defense counsel, other than counsel's client, the Joint Task Force Commander requires the permission of the prosecution. Accordingly, the Defense forwarded to the prosecution on November 15, 2007 a request by e-mail to interview Said Boujaadia, ISN 0150, Khalid Shaykh Muhammad, ISN 10024, Ramzi Bin al-Shib, ISN 10013, Abu Faraj al Libi, ISN 10017, and Abdul Rahim al-Sharqawi, ISN unknown.

2. On November 20, 2007, the prosecution responded by e-mail, requesting information required by R.M.C 703(c)(2)(B)(i) in conjunction with the Defense request to interview the above-mentioned detainees. The Defense disputes the prosecution's right to information under R.M.C. 703. R.M.C. 703 relates to the production of witnesses. The Defense is not at this time seeking the production of the witnesses listed in its e-mail of November 15, 2007. Rather, the Defense seeks only the prosecution's permission to interview the above listed detainees. Accordingly, the Defense does not believe that R.M.C. 703 is germane to its request. Instead, the Defense believes that the relevant R.M.C. is 701(j) (*Access to witnesses and evidence*). R.M.C. 701(j) provides that "each party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence." The Defense asserts that the withholding of permission to interview a detainee absent a summary of what the detainee's testimony is expected to be constitutes an unreasonable impediment to access. A requirement that the Defense proffer the expected testimony of a potential witness before interviewing that witness is contradictory to the purpose of such an interview and creates an unreasonable barrier to counsel's investigation in preparation of a defense for Mr. Hamdan.

3. The Defense agrees that for such a request to be reasonable there must be a reasonable expectation that the interview could lead to relevant testimonial or physical evidence. The Defense believes in this case that the potential for relevant evidence with respect to the above-referenced detainees was self-evident. Nevertheless, to prevent further delay, the Defense clarifies the purpose of the interviews as follows:

a) With respect to Said Boujaadia - Mr. Boujaadia was present at the time of Mr. Hamdan's capture and has direct knowledge of the circumstances relating to Mr. Hamdan's capture and any possible hostile act made by Mr. Hamdan immediately prior to capture. The Defense has previously interviewed Mr. Boujaadia, however, at the time of the interview the question of whether Mr. Hamdan was a lawful combat and the charges related to transportation of surface-to-air missiles were not at issue. Accordingly

the Defense seeks to re-interview Mr. Boujaadia prior to proffering him as a potential witness in Mr. Hamdan's December 5, 2007 pretrial hearing.

b) With respect to the remaining detainees - based on the Defense's knowledge and belief, each possess detailed information on the membership and activities of Al Qaeda. Mr. Hamdan's alleged membership in and/or support of Al Qaeda is directly relevant to the December 5 hearing. Accordingly, the Defense does not believe that it is unreasonable to interview these detainees prior to determining whether to proffer them as witnesses for the hearing.

If the prosecution nevertheless believes that a summary of testimony is required prior to granting permission to interview the above detainees, the Defense requests that denial of its request for interviews be made at the earliest opportunity in order to facilitate prompt judicial review.

C. D. Swift

Attachment E

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

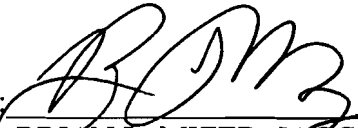
Defense Witness List
for Hearing Scheduled for 5-7 December 2007

28 November 2007

The Defense may call the following as witnesses at the hearing scheduled for 5-7 December, 2007:

1. Professor Brian Williams
2. Khalid Shaykh Muhammad
3. Ramzi Bin al-Shib
4. Abu Faraj al Libi
5. Said Boujaadia
6. Abdul Rahim al-Sharqawi
7. Nasser al-Bahri
8. Muhammed Ali Qassim al-Qala'a
9. Umat al-Subur Ali Qassim al-Qala'a
10. Salim Ahmed Hamdan

Respectfully submitted,

By: 
LT BRIAN L. MIZER, JAGC, USN
Detailed Defense Counsel
ANDREA J. PRASOW
Assistant Defense Counsel

PROF. CHARLES SWIFT
Emory School of Law

HARRY H. SCHNEIDER, JR.
JOSEPH M. MCMILLAN

Attachment F

Pursuant to R.M.C. 703, the Defense requests that the Government provide the following witnesses for the Defense at the military commission session scheduled to commence at 1300 hours on 5 December 2007, at the Courtroom in Guantanamo Bay, Cuba.

1. Professor Brian Williams

[REDACTED]

Synopsis of Expected Testimony

Professor Williams will testify regarding the characteristics of al Qaeda members, the functions performed at properties used by al Qaeda, and the nature of al Qaeda fighters' participation in combat in Afghanistan prior to Mr. Hamdan's capture. Professor Williams will testify that both before and after September 11, 2001, in the continuing conflict in Afghanistan that concluded with the battle of Tora Bora, Arabs including some of Osama bin Laden's bodyguards and other associates fought as part of the 055 Ansars – an Arab brigade that supported Taliban forces.

Professor Williams will testify that the 055 carried arms openly, fought in uniform under an established chain of command and fought in conventional battles that conformed to the laws of war. He will testify that the leadership of the 055 rejected terrorist attacks against civilians as legitimate form of combat and did not permit person under their command to engage in such activities. Professor Williams will testify that, prior to September 11, 2001, the 055 Ansars were a recognized fighting force in world military communities including the Northern Alliance and that the Northern Alliance leadership promised to extend protection under the Geneva Convention to members of the Ansars who surrendered or were captured. He is expected to testify that the allegations against Mr. Hamdan conform to participation and/or support of the Ansars and not terrorist activities.

Relevance and Necessity of Testimony

Professor Williams is an expert on conflict in Islamic Central Asia, transnational jihadi militant movements and al Qaeda. He has conducted extensive field research in Afghanistan and throughout the Muslim world, including Kazakhstan, Uzbekistan, Kosovo, Muslim Spain and Jordan/Israel/Egypt. He is an Associate Professor in the Department of History at the University of Massachusetts at Dartmouth and has taught at several other institutions. He has worked as a consultant for the Central Intelligence Agency and Scotland Yard. He has published a book and is a frequent contributor to scholarly journals and news magazines. His most recent publications include *Taliban Fedayeen: The World's*

Worst Suicide Bombers?, Terrorism Monitor, July 19, 2007 and *Anbar's Sunni Militias: Fighting by Proxy*, Jane's Islamic Affairs, September 25, 2007. Professor Williams' testimony will bear directly on whether Mr. Hamdan is an unlawful enemy combatant within the meaning of the MCA and international law.

Professor Williams is testifying as an expert at no cost to the government beyond travel costs. He has served as an expert witness in multiple federal asylum hearings on behalf of persons from Southeast Asia in which their previous affiliations with organizations such as resistance forces and political or military groups was at issue. Professor Williams' *curriculum vitae* is appended to this request.

2. Khalid Shaykh Muhammad
Detention Center, Guantanamo Bay, Cuba

Synopsis of Expected Testimony

The Government has alleged that Mr. Muhammad is a senior al Qaeda leader and the head of al Qaeda's military committee. As the Government denied the Defense request to interview Mr. Muhammad, the Defense is unable to provide a more detailed synopsis of the Mr. Muhammad's expected testimony. However, based on publicly available statements made by the Government and Mr. Muhammad, the Defense believes Mr. Muhammad will testify regarding his role in al Qaeda and will testify that Mr. Hamdan was not a member of al Qaeda, or that he was not involved in either the planning or execution of acts that allegedly violate the law of war.

Relevance and Necessity of Testimony

Mr. Hamdan is accused of, *inter alia*, being a member of al Qaeda. Mr. Muhammad's alleged role in al Qaeda suggests he will be able to testify as to whether Mr. Hamdan was also a member of that organization and whether he participated in the planning or execution of acts that allegedly violated the law of war. Specifically, Mr. Hamdan is charged with conspiring with members of al Qaeda to violate the laws of war by hijacking aircraft, attacking civilians, and by engaging in terrorism. At his Combatant Status Review Tribunal Hearing on March 10, 2007, Mr. Muhammad admitted his involvement in virtually every terrorist act allegedly committed by al Qaeda since 1996. But he insisted that many of the Arabs captured in Afghanistan who are now detained at Guantanamo Bay were not members of al Qaeda and had no involvement in al Qaeda's terrorist activities. No person in U.S. custody other than Mr. Muhammad could be more familiar with the extent of Mr. Hamdan's involvement in al Qaeda, or whether he had any involvement at all.

3. Ramzi Bin al-Shib
Detention Center, Guantanamo Bay, Cuba

Synopsis of Expected Testimony

The Government has alleged that Mr. Bin al-Shib is a senior al Qaeda operative who was involved in the planning and execution of the attacks on the United States on September 11, 2001. As the Government denied the Defense request to interview Mr. Bin al-Shib, the Defense is unable to provide a more detailed synopsis of Mr. Bin al-Shib's expected testimony. However, based on publicly available statements made by the Government and Mr. Bin al-Shib, the Defense believes Mr. Bin al-Shib will testify regarding his role in al Qaeda and that Mr. Hamdan was not a member of Al Qaeda, or that he was not involved in either the planning or execution of acts that allegedly violated the law of war.

Relevance and Necessity of Testimony

Mr. Hamdan is accused of, *inter alia*, being a member of al Qaeda. Mr. Bin al-Shib's alleged role in al Qaeda suggests he will be able to testify as to whether Mr. Hamdan was also a member of the organization and whether he participated in the planning or execution of acts that allegedly violated the law of war.

4. Abu Faraj al Libi
Detention Center, Guantanamo Bay, Cuba

Synopsis of Expected Testimony

The Government has alleged that Mr. al Libi is a senior facilitator for al Qaeda. In this capacity, Mr. al Libi was allegedly responsible for caring for al Qaeda families and transporting al Qaeda fighters to and from Afghanistan. As the Government denied the Defense request to interview Mr. al Libi, the Defense is unable to provide a more detailed synopsis of Mr. al Libi's expected testimony. However, based on publicly available statements made by the Government, the Defense believes Mr. al Libi will testify regarding his role in al Qaeda and that he will further testify that Mr. Hamdan was not a member of al Qaeda, or that he was not involved in either the planning or execution of acts that allegedly violated the law of war.

Relevance and Necessity of Testimony

Mr. Hamdan is accused of, *inter alia*, being a member of al Qaeda. Mr. al Libi's alleged role in al Qaeda suggests he will be able to testify as to whether Mr. Hamdan was also a member of the organization and whether he participated in the planning or execution of acts that allegedly violated the law of war.

5. Said Boujaadia

Detention Center, Guantanamo Bay, Cuba

Synopsis of Expected Testimony

Mr. Boujaadia was captured and detained in Afghanistan at the same time as Mr. Hamdan. As the Government denied the Defense request to interview Mr. Boujaadia, the Defense is unable to provide a more detailed synopsis of Mr. Boujaadia's expected testimony. However, the Defense believes Mr. Boujaadia can testify that he was in a van with two men who were carrying weapons. Mr. Boujaadia is also expected to testify that Mr. Hamdan was not in the van with him and the weapons, and that Mr. Boujaadia did not meet Mr. Hamdan until after they were both captured by Afghan forces.

Relevance and Necessity of Testimony

Whether Mr. Hamdan was carrying missiles in his car at the time of his capture is an issue central to the determination of whether he is an unlawful enemy combatant. Mr. Boujaadia is an eyewitness to key facts relevant to that determination.

6. Abdul Rahim al-Sharqawi

Detention Center, Guantanamo Bay, Cuba

Synopsis of Expected Testimony

Mr. al-Sharqawi, a/k/a/ Riyadh the Facilitator, is alleged to have served as a facilitator for al Qaeda by making travel arrangements for al Qaeda fighters into Afghanistan. As the Government denied the Defense request to interview Mr. al-Sharqawi, the Defense is unable to provide a more detailed synopsis of Mr. al-Sharqawi's expected testimony. However, the Defense believes Mr. al-Sharqawi can testify that he knew Mr. Hamdan was one of Osama bin Laden's drivers or bodyguards but that Mr. Hamdan was neither a member of al Qaeda nor a combatant. He is expected to testify that Mr. Hamdan spent most of his time in Afghanistan working on cars. Government records contend that Mr. al-Sharqawi facilitated travel for al Qaeda members. The Defense anticipates that Mr. al-Sharqawi can testify that he never facilitated any travel for Mr. Hamdan.

Relevance and Necessity of Testimony

Mr. al-Sharqawi, who along with Mr. al-Libi facilitated the movements of al-Qaeda fighters to and from Afghanistan, has direct knowledge of Mr. Hamdan's activities in Afghanistan. Specifically, Mr. al-Sharqawi was in a position to know whether Mr. Hamdan was a combatant and whether he participated in the planning or execution of acts that allegedly violated the law of war.

7. Nasser al-Bahri

[REDACTED]

[REDACTED]

Synopsis of Expected Testimony

Mr. al-Bahri served as Osama bin Laden's chief of security, and for a period of time headed up his bodyguard force. During that period of time he had personal knowledge as to the membership of bin Laden's bodyguard detail. Mr. al-Bahri is also Mr. Hamdan's brother-in-law. He is expected to testify that Mr. Hamdan never joined al Qaeda and had no interest in fighting. Mr. al-Bahri is expected to testify that Mr. Hamdan returned to Afghanistan in 2000 because he learned that Mr. al-Bahri was questioned by Yemeni security forces and was concerned that he would be considered suspicious because of his association with Mr. al-Bahri. Mr. al-Bahri will also testify that he was present when pictures of Mr. Hamdan were taken in which he appeared in uniform and accompanying Osama bin Laden and will testify as to the circumstances surrounding those pictures.

Relevance and Necessity of Testimony

Mr. al-Bahri's testimony is relevant as it will establish that Mr. Hamdan was not a member of al Qaeda during the time period alleged in the charge sheet, that Mr. Hamdan did not return to Afghanistan in 2000 to fight, and that Mr. Hamdan's associating with Osama bin Laden was purely professional. As Mr. al-Bahri is a family member of Mr. Hamdan, witness bias may be raised as an issue in the case. It is therefore essential that he testify in person so that the commission can judge his character and truthfulness.

8. Muhammed Ali Qassim al-Qala'a

[REDACTED]

[REDACTED]

Synopsis of Expected Testimony

Mr. al-Qala is Mr. Hamdan's brother-in-law. He is expected to testify regarding Mr. Hamdan's religious and cultural beliefs, reputation in the community, lack of interest in fighting, and the reasons why Mr. Hamdan and his family were in Afghanistan in 2001. Mr. al-Qala is expected to testify that Mr. Hamdan is not a Muslim extremist, was not a member of al Qaeda and never espoused anti-American beliefs, had no interest in fighting and was in Afghanistan in 2001 for

employment purposes. Mr. al-Qala is expected to testify that Mr. Hamdan returned to Afghanistan in 2000 because Mr. al-Qala informed him that Yemeni security forces had interviewed their brother-in-law and that it was not safe for Mr. Hamdan to return to Sana'a.

Relevance and Necessity of Testimony

Mr. al-Qala's testimony is relevant as it will establish Mr. Hamdan's nature of peacefulness and that he was not a fighter. Mr. al-Qala's testimony is also relevant to the circumstances surrounding Mr. Hamdan's travel to Yemen in 2000 and his return to Afghanistan. As Mr. al-Qala is a family member of Mr. Hamdan, witness bias may be raised as an issue in the case. It is therefore essential that he testify in person so that the commission can judge his character and truthfulness.

9. Umat al-Subur Ali Qassim al-Qala'a

[REDACTED]

[REDACTED]

Synopsis of Expected Testimony

Mrs. al-Qala is Mr. Hamdan's wife. She is expected to testify as to Mr. Hamdan's reasons for traveling to Afghanistan in 1999 and 2001 and the reason Mr. Hamdan did not leave Afghanistan with his wife in 2001. Mrs. al-Qala is expected to testify that Mr. Hamdan traveling to Afghanistan in 1999 with her in search of employment and that he never joined al-Qaeda. Mrs. al-Qala is also expected to testify that Mr. Hamdan and she returned home to Yemen in August 2000 with the intent of remaining there. However, Yemeni security forces questioned Mr. Hamdan's brother-in-law and he decided it would be safer for his family to return to Afghanistan and to return to his previous employment. Mrs. al-Qala is expected to testify that Mr. Hamdan returned to Afghanistan after taking her and their daughter to the Pakistani border because it was not safe for Arab men to cross at that time.

Relevance and Necessity of Testimony

Mrs. al-Qala's testimony will establish that Mr. Hamdan was not a member of al-Qaeda. As Mrs. al-Qala is a family member of Mr. Hamdan, witness bias may be raised as an issue in the case. It is therefore essential that she testify in person so that the commission can judge her character and truthfulness.

Curriculum Vitae

CV

Field Research

Publications

Conference Papers

Interviews

Home



The Book



Associate Professor

[Redacted]

[Redacted]

[Redacted]

- [Redacted]
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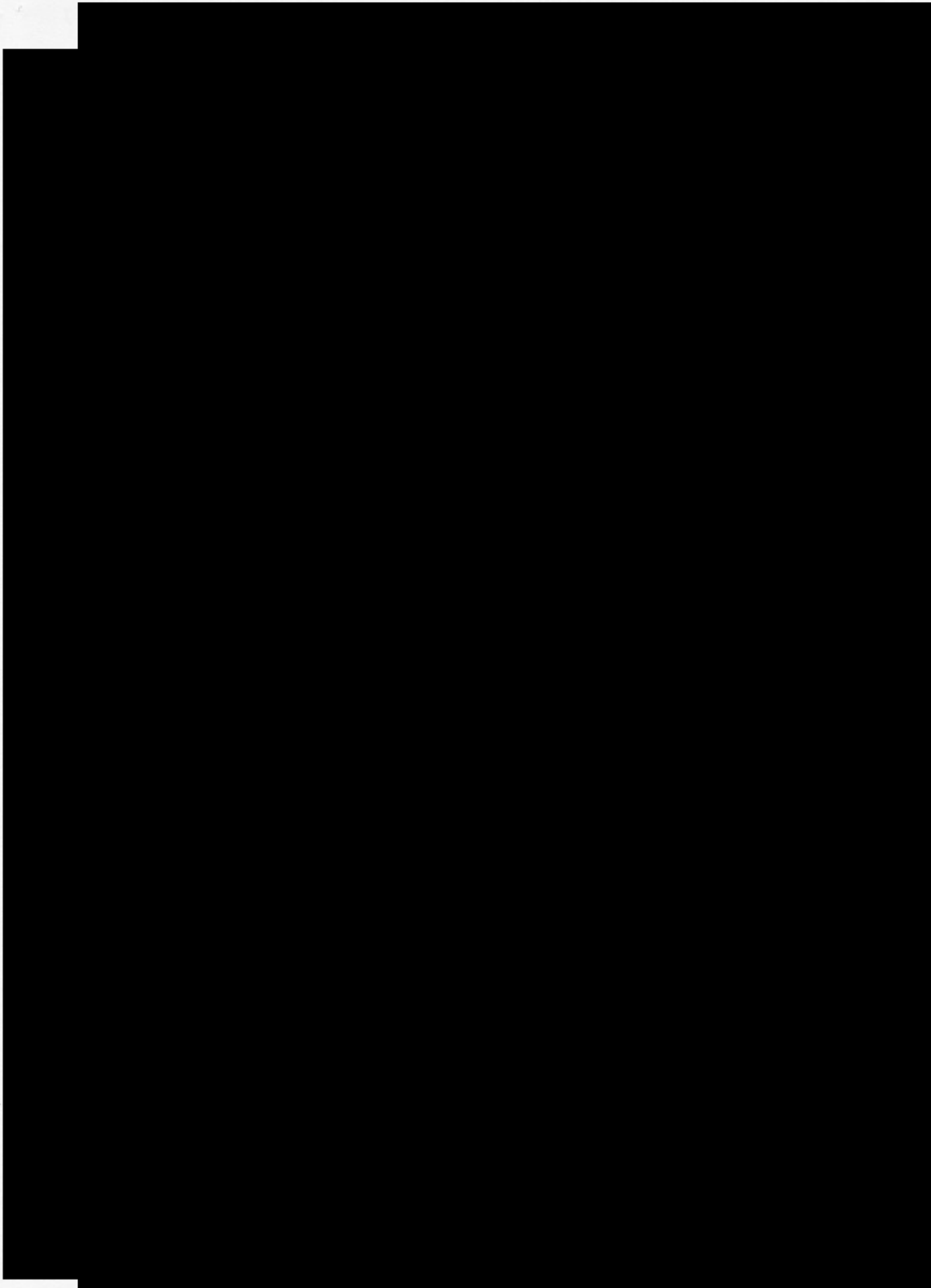
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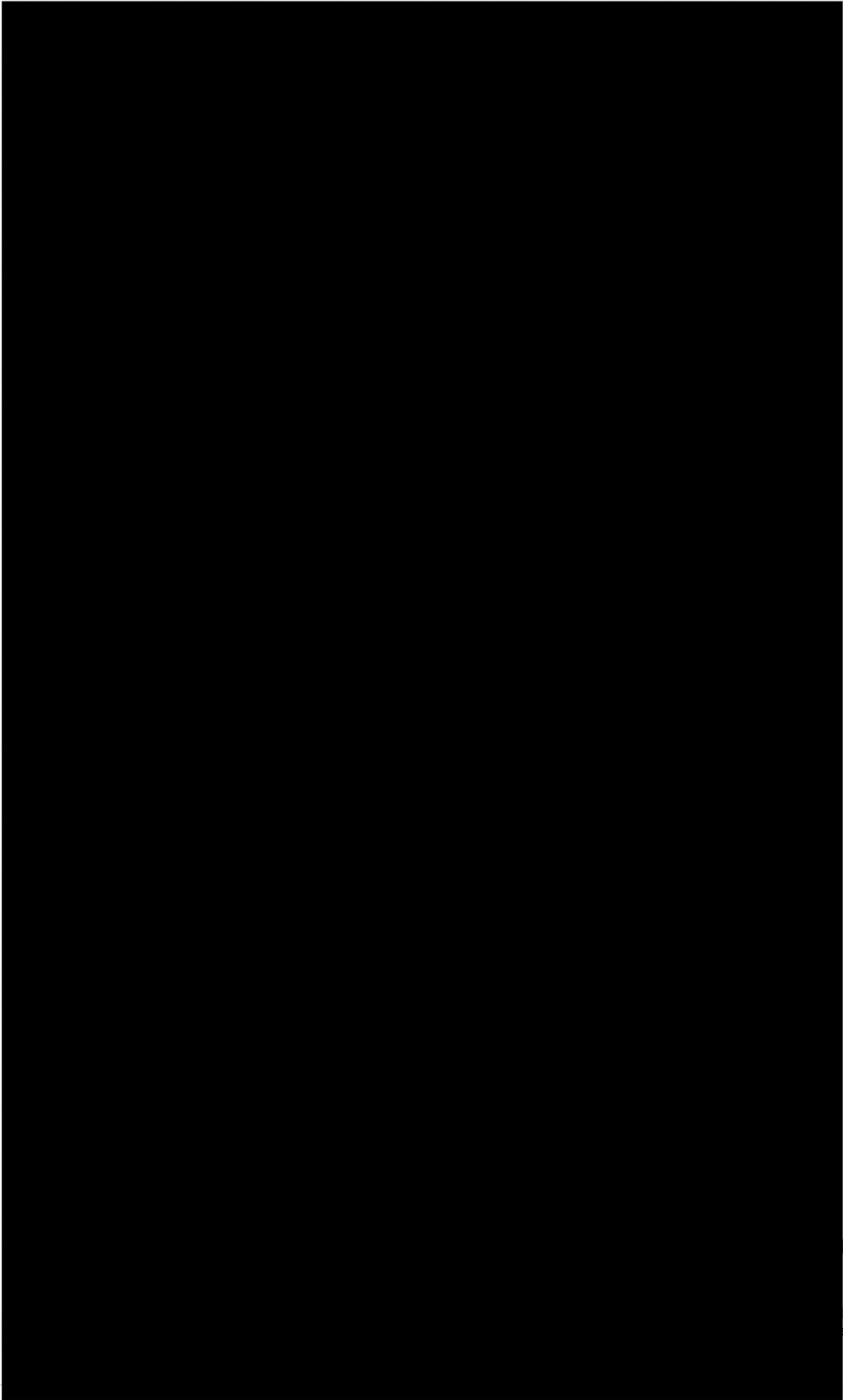
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Attached for filing in the case of United States v. Hamdan please find Defense Motion for Order Compelling Testimonial Immunity, or alternatively, Abatement. The PDF version is signed and includes attachments. The Word version is unsigned and does not include attachments.

Respectfully submitted,

AJP

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

Defense Motion
for Order Compelling Testimonial Immunity,
or alternatively, Abatement

4 December 2007

1. **Timeliness:** This motion is filed within the timeframe established by the Military Commissions Trial Judiciary Rules of Court.
2. **Relief Sought:** Defendant Salim Ahmed Hamdan moves for an Order compelling the Convening Authority to grant testimonial immunity to Said Boujaadia, or alternatively, abatement of the proceedings. The Defense request for immunity includes immunity from the use of testimonial statements and any information directly or indirectly derived from such testimony by Said Boujaadia, who the Defense wishes call as a witness in Mr. Hamdan's military commission.
3. **Overview:** On November 15, 2007, the Defense requested to interview Guantánamo Bay detainee Said Boujaadia. The Prosecution alleges that Mr. Boujaadia and Mr. Hamdan were captured at or about the same time in Afghanistan on November 24, 2001. The Prosecution has listed among the evidence it intends to introduce at the 5 December 2007 jurisdictional hearing a transcript of an interrogation of Mr. Boujaadia dating from 26 November 2001. That interrogation addressed, among other things, the circumstances of Mr. Boujaadia's and Mr. Hamdan's capture. If the Prosecution's allegations are true, then it is likely that Mr. Boujaadia has knowledge of the circumstances relating to Mr. Hamdan's capture and conduct prior to capture. Those

circumstances may be relevant to numerous disputed issues in this case, including facts relevant to the jurisdictional issue of unlawful enemy combatancy. Mr. Boujaadia's counsel informed the Defense that he will advise his client not to testify without the grant of testimonial immunity. (Attachment C.) On November 27, 2007, the Defense filed a request for testimonial immunity for Mr. Boujaadia, and on November 29, 2007, the Convening Authority for Military Commissions denied the request. This, despite the fact that in February 2007, Mr. Boujaadia's counsel had been informed that his client was on a list of individuals to be released from detention. Accordingly, the Defense moves pursuant to R.M.C. 704(e) for an Order from the Military Judge directing the Convening Authority to grant testimonial immunity to Mr. Boujaadia, or alternatively, to abate the proceedings until such time as arrangements can be made to secure Mr. Boujaadia's testimony.

4. Burden and Standard of Proof:

The burden is on the Defense as the moving party to establish its entitlement to the requested relief by a preponderance of the evidence.

5. Facts:

- A. On November 27, 2007, the Defense sent a request by electronic mail to the Convening Authority, Office of Military Commissions, for assistance in securing immunity for a potential defense witness in order to adequately prepare a request under R.M.C. 704(a)(2). The Defense requested testimonial immunity for Said Boujaadia currently in the custody of the United States and detained at Guantánamo Bay, Cuba. (Attachment B.)
- B. On November 29, 2007, the Convening Authority denied the request by the Defense. (Attachment C.)
- C. Mr. Boujaadia was captured by the same indigenous forces that captured Mr. Hamdan, at or near the time of Mr. Hamdan's capture. Mr. Boujaadia is expected to testify that prior to capture he was traveling in a separate vehicle from Mr. Hamdan and that in the vehicle with Mr. Boujaadia were two Egyptians armed with weapons. When confronted by indigenous

forces, the Egyptians engaged in a firefight and were killed.

- D. Subsequent to capture, Mr. Boujaadia is reported to have stated during interrogation that he was “90 percent sure that Mr. Hamdan was the driver of the vehicle.” He later corrected this statement and denied meeting Mr. Hamdan until after his capture.
- E. Mr. Boujaadia’s testimony is potentially material to matters at issue in Mr. Hamdan’s case, as it will establish the existence of a second vehicle and the presence of other armed men in that vehicle. Further, it will establish that Mr. Hamdan was not part of this group and that this group was a potential source of incriminating papers and materials allegedly seized in conjunction with Mr. Hamdan’s capture.
- F. To the Defense’s knowledge, Mr. Boujaadia is the only available eyewitness to these events. And, based on communications with Mr. Boujaadia’s counsel, the Defense believes that Mr. Boujaadia will refuse to testify absent a grant of immunity. Mr. Boujaadia’s counsel has stated that in February 2007, he was informed by the Office for the Administrative Review of the Detention of Enemy Combatants that Mr. Boujaadia had approved for release from detention at Guantanamo Bay. *See* Attachment A. However, Mr. Boujaadia remains in U.S. military custody at Guantanamo Bay at this time.

6. Law and Argument:

APPLICABLE LAW PROVIDES THE DEFENSE WITH THE RIGHT TO EVIDENCE AND WITNESSES

Rule for Military Commission 703(b) (*Right to witnesses.*) provides that “[e]ach party is entitled to the production of any available witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.”¹

The Prosecution has listed a transcript of Mr. Boujaadia’s interrogation as an exhibit it intends to introduce at the jurisdictional hearing on 5 December 2007. Without Mr. Boujaadia’s testimony at that hearing, the Defense may be severely and unreasonably

¹ *See also* 10 U.S.C. § 949j(a) (“RIGHT OF DEFENSE COUNSEL – Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.”; Regulation for Trial by Military Commissions 17-2(a) (“Pursuant to 10 U.S.C. § 949j, the defense counsel in a military commission shall have a reasonable opportunity to obtain witnesses and other evidence as provided by R.M.C. 701-703, and Mil. Comm. R. Evid. 505.”)

impeded from testing the Prosecution's case and challenging the evidence it presents concerning the circumstances of Mr. Hamdan's capture. The Defense has been informed that Mr. Boujaadia will invoke the right against self-incrimination and refuse to testify without a grant of testimonial immunity. (Attachment A.)

**IT IS PROPER FOR THE MILITARY COMMISSION TO ORDER A
GRANT TESTIMONIAL IMMUNITY, OR ALTERNATIVELY, ABATE
THE PROCEEDINGS**

Authority to Grant Immunity

The Convening Authority may grant testimonial immunity to any person pursuant to R.M.C. 704 and Regulation 15-1 and 15-2.

Rule for Military Commission 704(e) (*Decision to grant immunity.*) authorizes a military judge to order a grant of testimonial immunity or abate proceedings, when the Convening Authority has previously denied an immunity request, upon a showing that:

- (1) The witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify; and
- (2) The Government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the Government, through its own overreaching, has forced the witness to invoke the privilege against self-incrimination; and
- (3) The witness' testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses.

All three of these elements should be deemed satisfied in this case.

The witness intends to invoke the right against self-incrimination

On November 15, 2007, the Defense submitted a request to interview Mr. Boujaadia, with the prospect of calling him as a witness in the military commission proceedings against Mr. Hamdan. On November 20, 2007, Mr. Boujaadia's counsel, Zachary Katznelson, advised the Defense in a letter that unless Mr. Boujaadia was

granted testimonial immunity, he would advise Mr. Boujaadia to decline to testify. (Attachment A at 2). Mr. Boujaadia's counsel stated that he is concerned that if Mr. Boujaadia provides the Defense with exculpatory evidence, that he could be "subject to retributive sanctions by the prosecution." (*Id.*)

The Government's continued detention of Mr. Boujaadia is overreaching that has forced the witness to invoke the privilege against self-incrimination

Mr. Boujaadia was cleared for release from United States custody in February 2007. (*See* Attachment A). The Office for the Administration Review of the Detention of Enemy Combatants informed Mr. Boujaadia's counsel that Mr. Boujaadia had been "approved to leave Guantánamo, subject to the process for making appropriate diplomatic arrangements for his departure." (*Id.*)

Despite having cleared Mr. Boujaadia for release in February 2007, the Government continues to hold him. Mr. Boujaadia continues to be held despite the Defense's position that any testimony it seeks may be provided in a videotaped deposition. (*Id.*). Such a deposition is permitted under R.M.C. 702(g)(3), and any contention that it is necessary to hold Mr. Boujaadia for purposes of testifying in Mr. Hamdan's criminal proceeding is incorrect. Continued detention on such grounds places the witness in reasonable fear of retaliation, and should be deemed to constitute overreaching within the meaning of R.M.C. 704(e). As a result of the Government's failure to release Mr. Boujaadia, he has come to reasonably fear Government retaliation against him should any aspect of his testimony favor or exculpate Mr. Hamdan. This has forced Mr. Boujaadia to invoke the privilege against self-incrimination as per R.M.C. 704(e)(2).

The witness's testimony is potentially material, exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses

The Prosecution has refused the Defense's request to interview Mr. Boujaadia. Accordingly, the Defense is not in a position to fully describe what his testimony might be. Nevertheless, the Defense reasonably believes that Mr. Boujaadia's testimony is potentially material and exculpatory (depending on what the Prosecution asserts concerning Mr. Hamdan's conduct and the circumstances of his capture). Among other things, it appears that Mr. Boujaadia's testimony will establish the existence of a second vehicle of armed men at or near the time and place of Mr. Hamdan's capture. Moreover, Mr. Boujaadia's testimony will likely establish that Mr. Hamdan was not a part of this group and that this group was a potential source for incriminating documents and materials allegedly seized during Mr. Hamdan's capture. Indeed, an unclassified summary of the evidence for the Administrative Review Board in Mr. Boujaadia's case stated that "Afghan opposition figures troops took possession of two SA-7 missiles and an ICOM hand-held radio from the Arabs killed in the gunfight" at the time of Mr. Boujaadia's capture. Attachment D. The Prosecution has indicated that it intends to offer evidence concerning the circumstances of Mr. Hamdan's capture. Mr. Boujaadia's testimony could be highly significant in rebutting any assertion that Mr. Hamdan was captured while traveling with other fighters to a battlefield. Moreover, Mr. Boujaadia's testimony may contain information relevant to Mr. Hamdan's alleged membership in al Qaeda and his alleged participation in unlawful activities. For these reasons, Mr. Boujaadia's testimony will do more than merely affect the credibility of other witnesses, as per R.M.C. 704(e)(3).


Mr. Boujaadia's testimony is not cumulative and not obtainable from any other

source. Mr. Boujaadia was captured at or near the time and place of Mr. Hamdan's capture, by the same indigenous forces as Mr. Hamdan. He can be expected to have knowledge of the events surrounding Mr. Hamdan's capture.

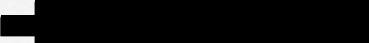
7. List of attachments:

- A. November 20, 2007 letter from Said Boujaadia counsel, Zachary Katznelson to Charles Swift, Defense Counsel for Salim Ahmed Hamdan.
- B. Request for Immunity, November 27, 2007, electronic mail from Charles D. Swift, Defense Counsel for Salim Ahmed Hamdan, to Convening Authority, Office of Military Commissions.
- C. Convening Authority for Military Commissions Decision on the Defense Request for Immunity for a Potential Defense Witness, November 29, 2007.
- D. Unclassified Summary of Combatant Status Review Tribunal for Said Boujaadia, October 28, 2007, and Unclassified Summary of Evidence for Administrative Review Board in the Case of Boujaadia, Said.

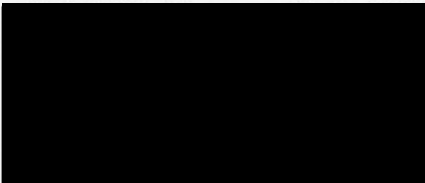
Respectfully submitted,

By: 
LT BRIAN L. MIZER, JAGC, USN
Detailed Defense Counsel
ANDREA J. PRASOW
Assistant Defense Counsel



PROF. CHARLES SWIFT
Emory School of Law

Civilian Defense Counsel

HARRY H. SCHNEIDER, JR.
JOSEPH M. MCMILLAN
Perkins Coie LLP



Attachment A



Reprive
PO Box 52742
London
EC4P 4WS

Tel: 020 7353 4640
Fax: 020 7353 4641
Email: info@reprive.org.uk
Website: www.reprive.org.uk

November 20, 2007

Charles D. Swift, JD, LLM
Acting Director of the International Humanitarian Law Clinic and Visiting Associate
Professor
Emory University School of Law

Re: Said Boujaadia, ISN 150

Dear Mr. Swift:

I write regarding my client Said Boujaadia. I understand that it is your wish to call Mr. Boujaadia as a witness in the Military Commission proceedings against Salim Hamdan.

The Office for the Administrative Review of the Detention of Enemy Combatants informed me in February 2007 that Mr. Boujaadia had been "approved to leave Guantánamo, subject to the process for making appropriate diplomatic arrangements for his departure." However, he has remained a prisoner. I had been perplexed by this, as one of our other Moroccan clients who had been cleared, Ahmed Errachidi, was sent home in April 2007 and is now free with his family. I could not understand why Mr. Boujaadia was not on the same plane back to Morocco. Mr. Boujaadia is a father of three children, only 10, 9 and 8 years old. His elderly mother is unwell and desperately wants to see her son before she dies. Like Mr. Errachidi, Mr. Boujaadia should be with his loved ones.

You have now explained what happened, and I am deeply disturbed. I understand that my cleared client is still in Guantánamo Bay, months later, solely because Carl Britt, Acting Chief Prosecutor in Guantánamo, placed a hold on his transfer, because Mr. Boujaadia *might* at some point be a witness in the case of Mr. Hamdan. I understand that Mr. Britt asked you to put a hold on Mr. Boujaadia, who would be a witness exculpating your client. I understand, further, that you said this would be totally unnecessary as under the commission rules you could both depose my client on videotape, and use such a statement in lieu of testimony. A videotape deposition would end any pretext that it might be necessary to hold Mr. Boujaadia one moment longer. When you refused to keep Mr. Boujaadia in Guantánamo Bay, Mr. Britt then imposed his own hold, denying Mr. Boujaadia the chance to go home to Morocco.

All of this was done by Mr. Britt without so much as a courtesy call to me about my client. In the meantime, I have been urgently working to secure Mr. Boujaadia's release, wholly unaware that the entire process had been secretly short-circuited by Mr. Britt.

I find this action by Mr. Britt reprehensible. Mr. Boujaadia's freedom should not in any way be compromised because he *might* at some point serve as a witness in another prisoner's case. There are countless ways to ensure Mr. Boujaadia's testimony is available for Mr. Hamdan's proceedings – without keeping him in Guantanamo Bay, let alone in the particularly harsh conditions of Camp 6, where he is housed.

I am willing to consent to your calling Mr. Boujaadia as a witness if all the following conditions are met:

First, I must obviously be permitted to discuss this matter with Mr. Boujaadia before you or anyone representing Mr. Hamdan, or anyone from the prosecution, speaks with Mr. Boujaadia. I must also be permitted to be present during any questioning of him by either the prosecution or defense. This would include any testimony before the Military Commission itself or any of its officers.

Second, Mr. Boujaadia must be offered complete testimonial immunity. This is clearly permitted by the commission rules.

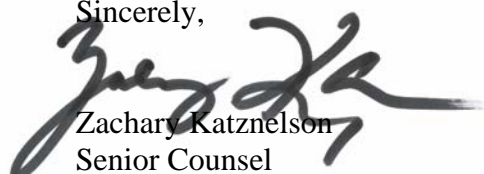
Third, Mr. Boujaadia's testimony must be taken as soon as possible after I meet with him, in a manner that will ensure that it is available as needed in future Commission proceedings. This should be completed by December 5, 2007, the date of your scheduled hearing. There can be no excuse for failing to conclude everything by that time, since Mr. Boujaadia's repatriation has already been delayed for several months in this inexcusable manner.

Fourth, that immediately after Mr. Boujaadia provides this testimony, Mr. Britt (or the relevant official) shall lift the hold against Mr. Boujaadia's transfer and that every effort be made to return Mr. Boujaadia immediately to his wife and children in Morocco.

My obvious concern is that if Mr. Boujaadia provides evidence exculpating your client, he will be subject to retributive sanctions by the prosecution. My concerns here are exacerbated by the fact that Mr. Britt has already punished my client by secretly barring him from returning to his family. Additionally, you have explained to me that Mr. Britt has threatened to charge Mr. Boujaadia as a co-conspirator with Mr. Hamdan. This is absurd, given the fact that Mr. Boujaadia has already been cleared by the U.S. government. The only possible reason for this threat is that Mr. Boujaadia may be willing to provide honest testimony for your client.

I look forward to your prompt response. Many thanks.

Sincerely,



Zachary Katznelson
Senior Counsel

Attachment B

27 November 2007

From: Charles D. Swift, Civilian Defense Counsel
To: Convening Authority, Office of Military Commissions

Subj: REQUEST FOR IMMUNITY

1. Pursuant to Rule for Military Commissions (R. M.C.) 704 and Regulation for Trial by Military Commissions (Regulation) 15 – 3(b), the Defense hereby submits the following request for immunity:

1. Name of Proceeding – *United States v. Salim Ahmed Hamdan*.
2. Name of Witness – Said Boujaadia, ISN 0150.
3. Name of Military Command to which the witness is assigned – Mr. Boujaadia is under the control of Commander, Joint Task Force Guantanamo.
4. Date and Place of Birth. Mr. Boujaadia is approximately 39 years old and a citizen of Morocco. The Defense is unaware of Mr. Boujaadia's place of birth but believes he was born on 5 May 1968.
5. FBI file number – Unknown.
6. State and Federal Charges. The Defense is not aware of any state or federal criminal charges are pending against Mr. Boujaadia. The Defense is aware that Prosecution previously stated in a conversation with the Defense that it was considering charging Mr. Boujaadia. The Defense notes, however, that subsequent to this conversation neither Mr. Hamdan's charge regarding the alleged conspiracy to commit murder by transporting surface-to-air missiles was amended to name Mr. Boujaadia nor have charges been sworn against Mr. Boujaadia. Consequently, the Defense submits that there is no evidence that the Prosecution actually intends to go forward with charges against Mr. Boujaadia.
7. Whether the Witness is Currently Incarcerated - Mr. Boujaadia is currently detained at Naval Station Guantanamo Bay. In February 2007, Mr. Boujaadia was cleared for transfer to Morocco by the Office for the Administrative Review of the Detention of Enemy Combatants. While Mr. Boujaadia was awaiting diplomatic clearance of his transfer, the Office of the Chief Prosecutor contacted military defense counsel to inform counsel of the transfer and to inquire whether the Defense would be willing to join a request for Mr. Boujaadia's release to be placed on hold. The Defense declined to join the request and requested that the Prosecution agree to a video deposition as an alternative to further detention of Mr. Boujaadia. The Prosecution declined agreement, and subsequently submitted an *ex parte* request that Mr. Boujaadia not be transferred. To the Defense's information and belief the Prosecution's request was granted. (See Enclosed letter from Mr. Boujaadia's counsel dated November 20, 2007.)

8. Background of Proceeding – Mr. Boujaadia’s testimony is sought both in conjunction with the substantive charges of conspiracy to commit murder in violation of the law of war (Charge 1, Specification 2) and providing material support for terrorism by providing surface to air missiles (Charge 2, Specifications 3 and 4), and in conjunction with Mr. Hamdan’s pre-trial jurisdictional hearing concerning his combatant status scheduled for December 5, 2007. (Referred charges attached.) Based on representations by the Prosecution, the Defense anticipates that the Government will offer evidence concerning the circumstances of Mr. Hamdan’s capture at the December 5 hearing. As an eyewitness to the events surrounding Mr. Hamdan’s capture, Mr. Boujaadia’s testimony will be essential to challenge the Government’s assertion that Mr. Hamdan was captured while traveling with other fighters and while transporting weapons.
9. Statement of Expected Testimony and Necessity – Mr. Boujaadia was captured in the same operation and by the same indigenous forces as Mr. Hamdan. Based on the Defense’s interview of Mr. Boujaadia in September 2004, Mr. Boujaadia is expected to testify that prior to capture he was traveling in a separate vehicle from Mr. Hamdan; that in the vehicle with him were two Egyptians who were both carrying weapons; that when stopped by indigenous forces, these individuals engaged in a fire fight and were subsequently killed. Subsequent to his capture, Mr. Boujaadia stated during interrogation that he was “90 percent sure that Mr. Hamdan was the driver of the vehicle.” During the Defense interview of Mr. Boujaadia, he corrected this statement and denied meeting Mr. Hamdan until after his capture.
10. Mr. Boujaadia’s testimony is necessary because it establishes the existence of a second vehicle and the presence of other armed men in that vehicle. Further, it establishes that Mr. Hamdan was not part of this group and that this group was the potential source for both the surface-to- air missiles and papers allegedly seized in conjunction with Mr. Hamdan’s capture. Testimony relevant to Mr. Hamdan’s possession of surface-to-air missiles is relevant both to his combatant status and to the charges against him. To the Defense’s knowledge and belief, Mr. Boujaadia is the only available eye witness to these events.

Based on communications with Mr. Boujaadia’s counsel, the Defense anticipates that Mr. Boujaadia, to the extent permitted by law, will refuse to testify absent a grant of immunity. In particular, Mr. Boujaadia’s counsel is concerned that Mr. Boujaadia will be subject to retaliatory detention should he testify favorably to Mr. Hamdan. Accordingly, in addition to testimonial immunity, counsel seeks a guarantee from the Convening Authority that the Convening Authority will direct the Office of the Chief Prosecutor to lift the hold placed on Mr. Boujaadia’s transfer once he has testified. Providing that Mr. Boujaadia’s testimony is videotaped for use at trial, the Defense would have no objection to Mr. Boujaadia’s release as the subject matter of both the criminal charges and the combatant status hearing involve identical facts.

11. Willingness to Testify With Grant of Immunity – Based on Mr. Boujaadia’s counsel’s representations, if immunity is granted the Defense anticipates that Mr. Boujaadia will testify.

12. Timeliness- The Defense notes that this request is not submitted in sufficient time to permit three weeks' consideration as required by Regulation 15-3(b). The Defense was unable comply with this requirement because Defense has not yet been served with discovery by the Prosecution. The Defense only became aware of the source, extent, and nature of the Government's evidence relating to Mr. Hamdan's capture on November 16, 2007 during a meeting with the Prosecution. Subsequent to that meeting the necessity for Mr. Boujaadia's testimony at the hearing became apparent. Thereafter, counsel contacted Mr. Boujaadia's attorney to confirm that Mr. Hamdan would be calling Mr. Boujaadia as a witness and, on November 20, 2007, Mr. Boujaadia's counsel responded with the attached letter necessitating this request. Accordingly, the Defense requests that the three week period in advance of granting testimonial immunity be waived. If the Convening Authority is unwilling to waive the three week consideration requirement, the Defense requests to be notified as soon as possible so that the Defense may seek an appropriate extension of time in conjunction with Mr. Hamdan's December 5, 2007 hearing.

/s/

C.D. Swift
Civilian Defense Counsel
Visiting Professor of Law
Emory University
1301 Clifton Road
Atlanta, GA 30302

Attachment C

SALIM AHMED HAMDAN

DECISION ON THE DEFENSE
REQUEST FOR IMMUNITY FOR A
POTENTIAL DEFENSE WITNESS

NOV 29 2007

Defense counsel has requested that Testimonial Immunity be granted to Said Boujaadia under Rule for Military Commission 704 in order to obtain his testimony in the above captioned case. The request is denied.

Susan J. Crawford
Susan J. Crawford
County Auditor

Susan J. Crawford
Convening Authority
for Military Commissions

Attachment D

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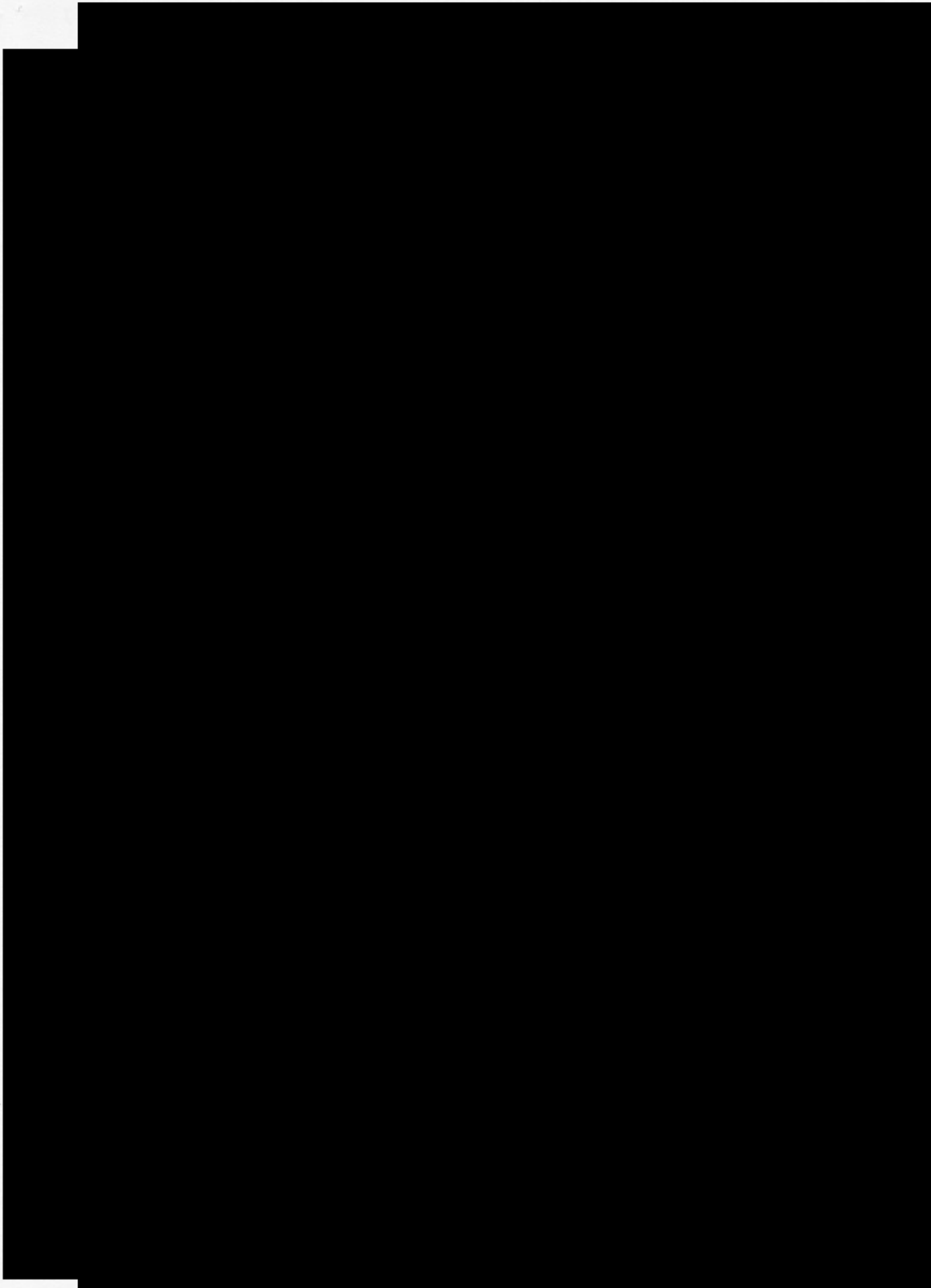
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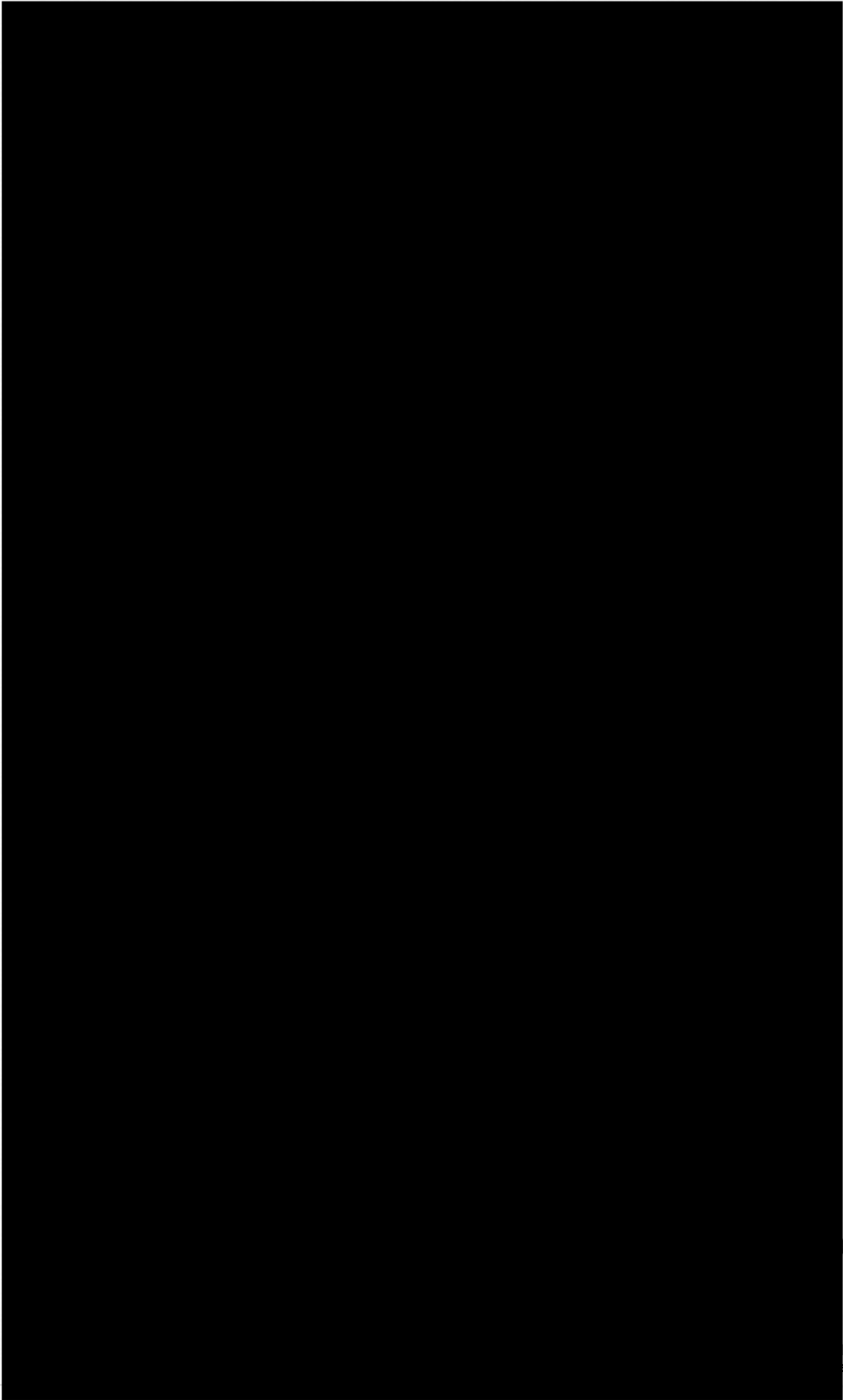
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AJP

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

Defense Motion
to Compel Production of Witnesses

4 December 2007

1. **Timeliness:** This motion is filed within the timeframe established by the Military Commissions Trial Judiciary Rules of Court.
2. **Relief Sought:** Defendant Salim Ahmed Hamdan moves to compel production of defense witnesses in accordance with Rule for Military Commissions (R.M.C.) 703, Manual for Military Commissions, United States (2007 ed.) and 10 U.S.C. § 947j (2006).
3. **Overview:** The defense has requested the production of nine defense witnesses for Mr. Hamdan's jurisdictional hearing, which is currently scheduled for 5 December 2007. The prosecution has refused to produce any of these witnesses, and it has provided no explanation for its refusal. Because the right to call witnesses in one's own behalf is a fundamental right, and because Mr. Hamdan cannot receive a fair adjudication of the personal jurisdiction issue without the production of these witnesses, Mr. Hamdan seeks the production of the requested defense witnesses.
4. **Burden and Standard of Proof:** The burden of persuasion on this motion rests with the moving party. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).
5. **Facts:**
 - A. On November 15, 2007, the Defense sent a request by electronic mail to the Prosecution for assistance in securing the opportunity to interview five potential defense witnesses in order to adequately prepare a request under R.M.C. 703(c)(2)(B)(i). The Defense requested interviews with five detainees currently in the custody of the United States and detained at Guantanamo: Khalid Shaykh Muhammad, Ramzi Bin al-Shib, Abu Faraj al Libi, Said Boujaadia and Abdul

Rahim al-Sharqawi. (Attachment A.)

- B. On November 20, 2007, having failed to receive a response, the Defense reiterated its request, noting that the military judge had ordered the Defense to provide its request for production of witnesses by November 28, 2007. (Attachment B.)
- C. On November 20, 2007, the Prosecution responded by requesting information required by R.M.C. 703(c)(2)(B)(i). (Attachment C.)
- D. On November 21, 2007, the Defense sent a memorandum to the Prosecution informing it that a request for access to potential witnesses is governed by R.M.C. 701(j), and provided additional information as to the relevance of the requested interviews. (Attachment D.)
- E. On November 28, 2007, the Defense provided a list of proposed witnesses to the commission and the Prosecution and submitted a request for production of witnesses pursuant to R.M.C. 703. (Attachments E, F.) The Defense request provided as much detail as was possible without the prior interviews of the five detainees.
- F. The Prosecution has refused to produce these witnesses, and it has provided no explanation for its refusal.

6. **Law and Argument:** The right to call witnesses in one's own defense has long been recognized as essential to a fair trial. *In re Oliver*, 333 U.S. 257, 273 (1948). In fact, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 301 (1973); *See also, United States v. McAllister*, 64 M.J. 248, 249 (C.A.A.F. 2007). In a trial by military commission, this fundamental right is provided for in R.M.C. 703(a) and 10 U.S.C. § 949j (2006), and by Common Article 3, which requires that Mr. Hamdan be afforded all the judicial guarantees that are "recognized as indispensable by civilized peoples." Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, 3318 (1955).

Mr. Hamdan is entitled to the production of witnesses whose testimony is both "relevant and necessary." R.M.C. 703(b)(1); 10 U.S.C. § 949j (2006); *See e.g., United States v. Breeding*, 44 M.J. 345 (C.A.A.F. 1996). The language contained in R.M.C. 703(b)(1) is identical to the

language contained in Rule for Courts-Martial (R.C.M.) 703(b)(1), Manual for Courts-Martial, United States (2005 ed.). Relevant evidence is “necessary when it is not cumulative and when it would contribute to a party’s presentation of the case in some positive way on a matter in issue.” R.C.M. 703(f)(1) discussion.

Aside from Professor Brian Williams, each of the requested defense witnesses were with Mr. Hamdan before his capture or immediately thereafter. Accordingly, these witnesses could testify as to whether Mr. Hamdan engaged in activities, or conspired with others to engage in activities, that would arguably violate the laws of war. For example, Mr. Hamdan is charged with conspiring with senior members of al Qaeda to attack and murder civilians and to destroy property in violation of the law of war. At the unclassified portion of his Combatant Status Review Tribunal Hearing on 10 March 2007, Mr. Khalid Shaykh Muhammad claimed responsibility for virtually every terrorist attack attributed to al Qaeda, including the attacks of September 11, 2001, which he claimed to have planned “from A to Z.” In a 10 July 2002 interrogation summary, Mr. Hamdan reportedly told investigators that he met Mr. Muhammad when he returned to Afghanistan from Yemen in April 2001, and that he regularly saw Mr. Muhammad thereafter. If these accounts are true, then no other person currently in U.S. custody is in a better position to testify as to Mr. Hamdan’s participation in the planning or execution of violations of the law of war than Mr. Muhammad.

7. Request for Oral Argument: The Defense does not request oral argument on the issues raised in this motion.

8. Request for Witnesses: As the Defense does not request oral argument, the Defense does not intend to call witnesses in connection with this motion, but reserves the right to do so if oral argument is scheduled and the Prosecution’s response raises issues requiring rebuttal


testimony.

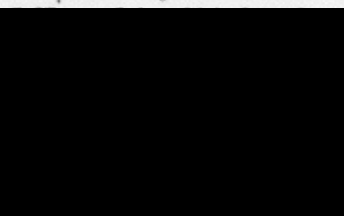
9. **List of Attachments:**


- A. E-mail from Andrea Prasow to LTC Britt and LCDR Stone, November 15, 2007.
- B. E-mail from Andrea Prasow to LTC and LCDR Stone, November 20, 2007.
- C. E-mail from LTC Britt to Andrea Prasow, November 20, 2007.
- D. Memorandum from Professor Charles Swift to LTC Britt, November 21, 2007.
- E. Defense Witness List, November 28, 2007.
- F. Defense Request for Production of Witnesses, November 28, 2007.

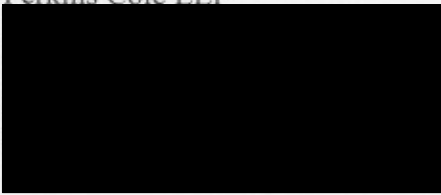
10. **Conference with Opposing Counsel:** The Defense has conferred with the Prosecution, which opposes this motion.

Respectfully submitted,

By: 
LT BRIAN L. MIZER, JAGC, USN
Detailed Defense Counsel
ANDREA J. PRASOW
Assistant Defense Counsel

 e Counsel
sions
000E

PROF. CHARLES SWIFT
Emory School of Law

Civilian Defense Counsel

HARRY H. SCHNEIDER, JR.
JOSEPH M. MCMILLAN
Perkins Coie LLP


Attachment A

[REDACTED]

From: Prasow, Andrea, Ms, DoD OGC [REDACTED] ilj
Sent: Thursday, November 29, 2007 6:28 PM
To: [REDACTED], LN1, DoD OGC
Subject: FW: US v. Hamdan - Request for Interviews
Signed By: p [REDACTED]

From: Prasow, Andrea, Ms, DoD OGC
Sent: Thursday, November 15, 2007 14:36
To: Britt, William, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC
Cc: Mizer, Brian, LT, DoD OGC
Subject: US v. Hamdan - Request for Interviews

Gentlemen,

As you know, the list of witnesses and evidence upon which we intend to rely for the December 5 hearing is due on 28 November. In order to determine whether we will call certain people as witnesses, we need the opportunity to interview them in advance. Accordingly, we request your assistance in securing the opportunity to interview the following persons for the limited purpose of preparing for the December 5 hearing. We do not waive the opportunity to seek [REDACTED] additional interviews with them to prepare for trial.

Khalid Shaykh Muhammad, I [REDACTED]

Ramzi Bin al-Shib, [REDACTED]

Abu Faraj al Libi, [REDACTED]

Said Boujaadia, [REDACTED]

Abdul Rahim al-Sharqawi

Please let us know what additional information you might require from us in order to schedule these interviews.

Thank you,
AJP

Andrea J. Prasow
Office of the Chief Defense Counsel

[REDACTED]

Attachment B

[REDACTED]

From: Prasow, Andrea, Ms, DoD OGC [REDACTED]
Sent: Thursday, November 29, 2007 6:28 PM
To: [REDACTED]
Subject: FW: US v. Hamdan - Request for Interviews
Signed By: [REDACTED]

From: Prasow, Andrea, Ms, DoD OGC
Sent: Tuesday, November 20, 2007 09:42
To: Britt, William, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC
Cc: Mizer, Brian, LT, DoD OGC
Subject: FW: US v. Hamdan - Request for Interviews

Gentlemen,

As travel may be difficult with the upcoming holiday, please confirm if you will be facilitating these witness interviews in advance of the 28 November deadline to disclose the identity of witnesses and to provide the commission with a synopsis of the expected testimony.

Thank you,
AJP

From: Prasow, Andrea, Ms, DoD OGC
Sent: Thursday, November 15, 2007 14:36
To: Britt, William, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC
Cc: Mizer, Brian, LT, DoD OGC
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Khalid Shaykh [REDACTED]
Ramzi Bin al-Shib, [REDACTED]
Abu Faraj al Libi, [REDACTED]
Said Boujaadia, [REDACTED]
Abdul Rahim al-Sharqawi

Please let us know what additional information you might require from us in order to schedule these interviews.

Thank you,
AJP

Andrea J. Prasow
Office of the Chief Defense Counsel
Office of Military Commissions

Attachment C

Ms. Prasow = please provide the information required by R.C.M. =03(c)(2)(B)(i). Thank you. wbb.

WILLIAM B. BRITT

LTC, JA, USAR =BR>Deputy Chief Prosecutor
OFFICE =F MILITARY COMMISSIONS

CONFIDENTIALITY NOTICE: This electronic transmission may contain attorney work-product =r information protected under the attorney-client privilege, both of which =re protected from disclosure under the Freedom of Information Act, 5 USC =52. Do not release outside of DoD channels without prior authorization from the =sender.

=/P>

From: Prasow, Andrea, Ms, DoD OGC
Sent: Tuesday, November 20, 2007 9:42 AM
To: Britt, =William, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC
Cc: Mizer, =rian, LT, DoD OGC
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Thank you,
AJP

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Sent: Thursday, November 15, 2007 14:36
To: Britt, =illiam, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC
Cc: Mizer, Brian, LT, =oD OGC
Subject: US v. Hamdan - Request for Interviews

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prepare =or trial.

Khalid Shaykh Muhammad, = [REDACTED]

Ramzi Bin al-Shib, [REDACTED]

Abu Faraj al Libi, [REDACTED]

Said Boujaadia, [REDACTED]

Abdul Rahim al-Sharqawi

Please let us know what additional =nformation you might require from us in order to schedule these interviews.

Thank you,
AJP

Andrea J. Prasow
Office of the Chief Defense Counsel
Office of Military Commissions

[REDACTED]

Attachment D

MEMORANDUM

November 21, 2007

From: Professor Charles Swift, Civilian Defense Counsel

To: Colonel William Britt, Military Prosecutor

Re: Prosecution Request for Information required by 703(c)(2)(B)(i) in conjunction with request to interview detainees at Guantánamo Bay

1. To the best of the Defense's knowledge and belief, prior to permitting an interview of a detainee by defense counsel, other than counsel's client, the Joint Task Force Commander requires the permission of the prosecution. Accordingly, the Defense forwarded to the prosecution on November 15, 2007 a request by e-mail to interview Said Boujaadia, ISN 0150, Khalid Shaykh Muhammad, ISN 10024, Ramzi Bin al-Shib, ISN 10013, Abu Faraj al Libi, ISN 10017, and Abdul Rahim al-Sharqawi, ISN unknown.

2. On November 20, 2007, the prosecution responded by e-mail, requesting information required by R.M.C 703(c)(2)(B)(i) in conjunction with the Defense request to interview the above-mentioned detainees. The Defense disputes the prosecution's right to information under R.M.C. 703. R.M.C. 703 relates to the production of witnesses. The Defense is not at this time seeking the production of the witnesses listed in its e-mail of November 15, 2007. Rather, the Defense seeks only the prosecution's permission to interview the above listed detainees. Accordingly, the Defense does not believe that R.M.C. 703 is germane to its request. Instead, the Defense believes that the relevant R.M.C. is 701(j) (*Access to witnesses and evidence*). R.M.C. 701(j) provides that "each party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence." The Defense asserts that the withholding of permission to interview a detainee absent a summary of what the detainee's testimony is expected to be constitutes an unreasonable impediment to access. A requirement that the Defense proffer the expected testimony of a potential witness before interviewing that witness is contradictory to the purpose of such an interview and creates an unreasonable barrier to counsel's investigation in preparation of a defense for Mr. Hamdan.

3. The Defense agrees that for such a request to be reasonable there must be a reasonable expectation that the interview could lead to relevant testimonial or physical evidence. The Defense believes in this case that the potential for relevant evidence with respect to the above-referenced detainees was self-evident. Nevertheless, to prevent further delay, the Defense clarifies the purpose of the interviews as follows:

a) With respect to Said Boujaadia - Mr. Boujaadia was present at the time of Mr. Hamdan's capture and has direct knowledge of the circumstances relating to Mr. Hamdan's capture and any possible hostile act made by Mr. Hamdan immediately prior to capture. The Defense has previously interviewed Mr. Boujaadia, however, at the time of the interview the question of whether Mr. Hamdan was a lawful combat and the charges related to transportation of surface-to-air missiles were not at issue. Accordingly

the Defense seeks to re-interview Mr. Boujaadia prior to proffering him as a potential witness in Mr. Hamdan's December 5, 2007 pretrial hearing.

b) With respect to the remaining detainees - based on the Defense's knowledge and belief, each possess detailed information on the membership and activities of Al Qaeda. Mr. Hamdan's alleged membership in and/or support of Al Qaeda is directly relevant to the December 5 hearing. Accordingly, the Defense does not believe that it is unreasonable to interview these detainees prior to determining whether to proffer them as witnesses for the hearing.

If the prosecution nevertheless believes that a summary of testimony is required prior to granting permission to interview the above detainees, the Defense requests that denial of its request for interviews be made at the earliest opportunity in order to facilitate prompt judicial review.

C. D. Swift

Attachment E

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

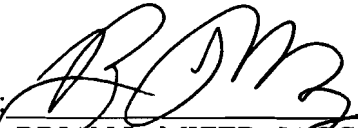
Defense Witness List
for Hearing Scheduled for 5-7 December 2007

28 November 2007

The Defense may call the following as witnesses at the hearing scheduled for 5-7 December, 2007:

1. Professor Brian Williams
2. Khalid Shaykh Muhammad
3. Ramzi Bin al-Shib
4. Abu Faraj al Libi
5. Said Boujaadia
6. Abdul Rahim al-Sharqawi
7. Nasser al-Bahri
8. Muhammed Ali Qassim al-Qala'a
9. Umat al-Subur Ali Qassim al-Qala'a
10. Salim Ahmed Hamdan

Respectfully submitted,

By: 
LT BRIAN L. MIZER, JAGC, USN
Detailed Defense Counsel
ANDREA J. PRASOW
Assistant Defense Counsel

PROF. CHARLES SWIFT
Emory School of Law

HARRY H. SCHNEIDER, JR.
JOSEPH M. MCMILLAN

Attachment F

Pursuant to R.M.C. 703, the Defense requests that the Government provide the following witnesses for the Defense at the military commission session scheduled to commence at 1300 hours on 5 December 2007, at the Courtroom in Guantanamo Bay, Cuba.

1.



Synopsis of Expected Testimony

Professor Williams will testify regarding the characteristics of al Qaeda members, the functions performed at properties used by al Qaeda, and the nature of al Qaeda fighters' participation in combat in Afghanistan prior to Mr. Hamdan's capture. Professor Williams will testify that both before and after September 11, 2001, in the continuing conflict in Afghanistan that concluded with the battle of Tora Bora, Arabs including some of Osama bin Laden's bodyguards and other associates fought as part of the 055 Ansars – an Arab brigade that supported Taliban forces.

Professor Williams will testify that the 055 carried arms openly, fought in uniform under an established chain of command and fought in conventional battles that conformed to the laws of war. He will testify that the leadership of the 055 rejected terrorist attacks against civilians as legitimate form of combat and did not permit person under their command to engage in such activities. Professor Williams will testify that, prior to September 11, 2001, the 055 Ansars were a recognized fighting force in world military communities including the Northern Alliance and that the Northern Alliance leadership promised to extend protection under the Geneva Convention to members of the Ansars who surrendered or were captured. He is expected to testify that the allegations against Mr. Hamdan conform to participation and/or support of the Ansars and not terrorist activities.

Relevance and Necessity of Testimony

Professor Williams is an expert on conflict in Islamic Central Asia, transnational jihadi militant movements and al Qaeda. He has conducted extensive field research in Afghanistan and throughout the Muslim world, including Kazakhstan, Uzbekistan, Kosovo, Muslim Spain and Jordan/Israel/Egypt. He is an Associate Professor in the Department of History at the University of Massachusetts at Dartmouth and has taught at several other institutions. He has worked as a consultant for the Central Intelligence Agency and Scotland Yard. He has published a book and is a frequent contributor to scholarly journals and news magazines. His most recent publications include *Taliban Fedayeen: The World's*

Worst Suicide Bombers?, Terrorism Monitor, July 19, 2007 and *Anbar's Sunni Militias: Fighting by Proxy*, Jane's Islamic Affairs, September 25, 2007. Professor Williams' testimony will bear directly on whether Mr. Hamdan is an unlawful enemy combatant within the meaning of the MCA and international law.

Professor Williams is testifying as an expert at no cost to the government beyond travel costs. He has served as an expert witness in multiple federal asylum hearings on behalf of persons from Southeast Asia in which their previous affiliations with organizations such as resistance forces and political or military groups was at issue. Professor Williams' *curriculum vitae* is appended to this request.

2. Khalid Shaykh Muhammad
Detention Center, Guantanamo Bay, Cuba

Synopsis of Expected Testimony

The Government has alleged that Mr. Muhammad is a senior al Qaeda leader and the head of al Qaeda's military committee. As the Government denied the Defense request to interview Mr. Muhammad, the Defense is unable to provide a more detailed synopsis of the Mr. Muhammad's expected testimony. However, based on publicly available statements made by the Government and Mr. Muhammad, the Defense believes Mr. Muhammad will testify regarding his role in al Qaeda and will testify that Mr. Hamdan was not a member of al Qaeda, or that he was not involved in either the planning or execution of acts that allegedly violate the law of war.

Relevance and Necessity of Testimony

Mr. Hamdan is accused of, *inter alia*, being a member of al Qaeda. Mr. Muhammad's alleged role in al Qaeda suggests he will be able to testify as to whether Mr. Hamdan was also a member of that organization and whether he participated in the planning or execution of acts that allegedly violated the law of war. Specifically, Mr. Hamdan is charged with conspiring with members of al Qaeda to violate the laws of war by hijacking aircraft, attacking civilians, and by engaging in terrorism. At his Combatant Status Review Tribunal Hearing on March 10, 2007, Mr. Muhammad admitted his involvement in virtually every terrorist act allegedly committed by al Qaeda since 1996. But he insisted that many of the Arabs captured in Afghanistan who are now detained at Guantanamo Bay were not members of al Qaeda and had no involvement in al Qaeda's terrorist activities. No person in U.S. custody other than Mr. Muhammad could be more familiar with the extent of Mr. Hamdan's involvement in al Qaeda, or whether he had any involvement at all.

3. Ramzi Bin al-Shib
Detention Center, Guantanamo Bay, Cuba

Synopsis of Expected Testimony

The Government has alleged that Mr. Bin al-Shib is a senior al Qaeda operative who was involved in the planning and execution of the attacks on the United States on September 11, 2001. As the Government denied the Defense request to interview Mr. Bin al-Shib, the Defense is unable to provide a more detailed synopsis of Mr. Bin al-Shib's expected testimony. However, based on publicly available statements made by the Government and Mr. Bin al-Shib, the Defense believes Mr. Bin al-Shib will testify regarding his role in al Qaeda and that Mr. Hamdan was not a member of Al Qaeda, or that he was not involved in either the planning or execution of acts that allegedly violated the law of war.

Relevance and Necessity of Testimony

Mr. Hamdan is accused of, *inter alia*, being a member of al Qaeda. Mr. Bin al-Shib's alleged role in al Qaeda suggests he will be able to testify as to whether Mr. Hamdan was also a member of the organization and whether he participated in the planning or execution of acts that allegedly violated the law of war.

4. Abu Faraj al Libi
Detention Center, Guantanamo Bay, Cuba

Synopsis of Expected Testimony

The Government has alleged that Mr. al Libi is a senior facilitator for al Qaeda. In this capacity, Mr. al Libi was allegedly responsible for caring for al Qaeda families and transporting al Qaeda fighters to and from Afghanistan. As the Government denied the Defense request to interview Mr. al Libi, the Defense is unable to provide a more detailed synopsis of Mr. al Libi's expected testimony. However, based on publicly available statements made by the Government, the Defense believes Mr. al Libi will testify regarding his role in al Qaeda and that he will further testify that Mr. Hamdan was not a member of al Qaeda, or that he was not involved in either the planning or execution of acts that allegedly violated the law of war.

Relevance and Necessity of Testimony

Mr. Hamdan is accused of, *inter alia*, being a member of al Qaeda. Mr. al Libi's alleged role in al Qaeda suggests he will be able to testify as to whether Mr. Hamdan was also a member of the organization and whether he participated in the planning or execution of acts that allegedly violated the law of war.

5. Said Boujaadia

Detention Center, Guantanamo Bay, Cuba

Synopsis of Expected Testimony

Mr. Boujaadia was captured and detained in Afghanistan at the same time as Mr. Hamdan. As the Government denied the Defense request to interview Mr. Boujaadia, the Defense is unable to provide a more detailed synopsis of Mr. Boujaadia's expected testimony. However, the Defense believes Mr. Boujaadia can testify that he was in a van with two men who were carrying weapons. Mr. Boujaadia is also expected to testify that Mr. Hamdan was not in the van with him and the weapons, and that Mr. Boujaadia did not meet Mr. Hamdan until after they were both captured by Afghan forces.

Relevance and Necessity of Testimony

Whether Mr. Hamdan was carrying missiles in his car at the time of his capture is an issue central to the determination of whether he is an unlawful enemy combatant. Mr. Boujaadia is an eyewitness to key facts relevant to that determination.

6. Abdul Rahim al-Sharqawi

Detention Center, Guantanamo Bay, Cuba

Synopsis of Expected Testimony

Mr. al-Sharqawi, a/k/a/ Riyadh the Facilitator, is alleged to have served as a facilitator for al Qaeda by making travel arrangements for al Qaeda fighters into Afghanistan. As the Government denied the Defense request to interview Mr. al-Sharqawi, the Defense is unable to provide a more detailed synopsis of Mr. al-Sharqawi's expected testimony. However, the Defense believes Mr. al-Sharqawi can testify that he knew Mr. Hamdan was one of Osama bin Laden's drivers or bodyguards but that Mr. Hamdan was neither a member of al Qaeda nor a combatant. He is expected to testify that Mr. Hamdan spent most of his time in Afghanistan working on cars. Government records contend that Mr. al-Sharqawi facilitated travel for al Qaeda members. The Defense anticipates that Mr. al-Sharqawi can testify that he never facilitated any travel for Mr. Hamdan.

Relevance and Necessity of Testimony

Mr. al-Sharqawi, who along with Mr. al-Libi facilitated the movements of al-Qaeda fighters to and from Afghanistan, has direct knowledge of Mr. Hamdan's activities in Afghanistan. Specifically, Mr. al-Sharqawi was in a position to know whether Mr. Hamdan was a combatant and whether he participated in the planning or execution of acts that allegedly violated the law of war.

7. Nasser al-Bahri
Sana'a, Yemen

Synopsis of Expected Testimony

Mr. al-Bahri served as Osama bin Laden's chief of security, and for a period of time headed up his bodyguard force. During that period of time he had personal knowledge as to the membership of bin Laden's bodyguard detail. Mr. al-Bahri is also Mr. Hamdan's brother-in-law. He is expected to testify that Mr. Hamdan never joined al Qaeda and had no interest in fighting. Mr. al-Bahri is expected to testify that Mr. Hamdan returned to Afghanistan in 2000 because he learned that Mr. al-Bahri was questioned by Yemeni security forces and was concerned that he would be considered suspicious because of his association with Mr. al-Bahri. Mr. al-Bahri will also testify that he was present when pictures of Mr. Hamdan were taken in which he appeared in uniform and accompanying Osama bin Laden and will testify as to the circumstances surrounding those pictures.

Relevance and Necessity of Testimony

Mr. al-Bahri's testimony is relevant as it will establish that Mr. Hamdan was not a member of al Qaeda during the time period alleged in the charge sheet, that Mr. Hamdan did not return to Afghanistan in 2000 to fight, and that Mr. Hamdan's associating with Osama bin Laden was purely professional. As Mr. al-Bahri is a family member of Mr. Hamdan, witness bias may be raised as an issue in the case. It is therefore essential that he testify in person so that the commission can judge his character and truthfulness.

8. Muhammed Ali Qassim al-Qala'a
Sana'a, Yemen

Synopsis of Expected Testimony

Mr. al-Qala is Mr. Hamdan's brother-in-law. He is expected to testify regarding Mr. Hamdan's religious and cultural beliefs, reputation in the community, lack of interest in fighting, and the reasons why Mr. Hamdan and his family were in Afghanistan in 2001. Mr. al-Qala is expected to testify that Mr. Hamdan is not a Muslim extremist, was not a member of al Qaeda and never espoused anti-American beliefs, had no interest in fighting and was in Afghanistan in 2001 for

employment purposes. Mr. al-Qala is expected to testify that Mr. Hamdan returned to Afghanistan in 2000 because Mr. al-Qala informed him that Yemeni security forces had interviewed their brother-in-law and that it was not safe for Mr. Hamdan to return to Sana'a.

Relevance and Necessity of Testimony

Mr. al-Qala's testimony is relevant as it will establish Mr. Hamdan's nature of peacefulness and that he was not a fighter. Mr. al-Qala's testimony is also relevant to the circumstances surrounding Mr. Hamdan's travel to Yemen in 2000 and his return to Afghanistan. As Mr. al-Qala is a family member of Mr. Hamdan, witness bias may be raised as an issue in the case. It is therefore essential that he testify in person so that the commission can judge his character and truthfulness.

9. Umat al-Subur Ali Qassim al-Qala'a

[REDACTED]
Sana'a, Yemen

[REDACTED]

Synopsis of Expected Testimony

Mrs. al-Qala is Mr. Hamdan's wife. She is expected to testify as to Mr. Hamdan's reasons for traveling to Afghanistan in 1999 and 2001 and the reason Mr. Hamdan did not leave Afghanistan with his wife in 2001. Mrs. al-Qala is expected to testify that Mr. Hamdan traveling to Afghanistan in 1999 with her in search of employment and that he never joined al-Qaeda. Mrs. al-Qala is also expected to testify that Mr. Hamdan and she returned home to Yemen in August 2000 with the intent of remaining there. However, Yemeni security forces questioned Mr. Hamdan's brother-in-law and he decided it would be safer for his family to return to Afghanistan and to return to his previous employment. Mrs. al-Qala is expected to testify that Mr. Hamdan returned to Afghanistan after taking her and their daughter to the Pakistani border because it was not safe for Arab men to cross at that time.

Relevance and Necessity of Testimony

Mrs. al-Qala's testimony will establish that Mr. Hamdan was not a member of al-Qaeda. As Mrs. al-Qala is a family member of Mr. Hamdan, witness bias may be raised as an issue in the case. It is therefore essential that she testify in person so that the commission can judge her character and truthfulness.

Curriculum Vitae



CV

Field Research

Publications

Conference Papers

Interviews

Home



The Book



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